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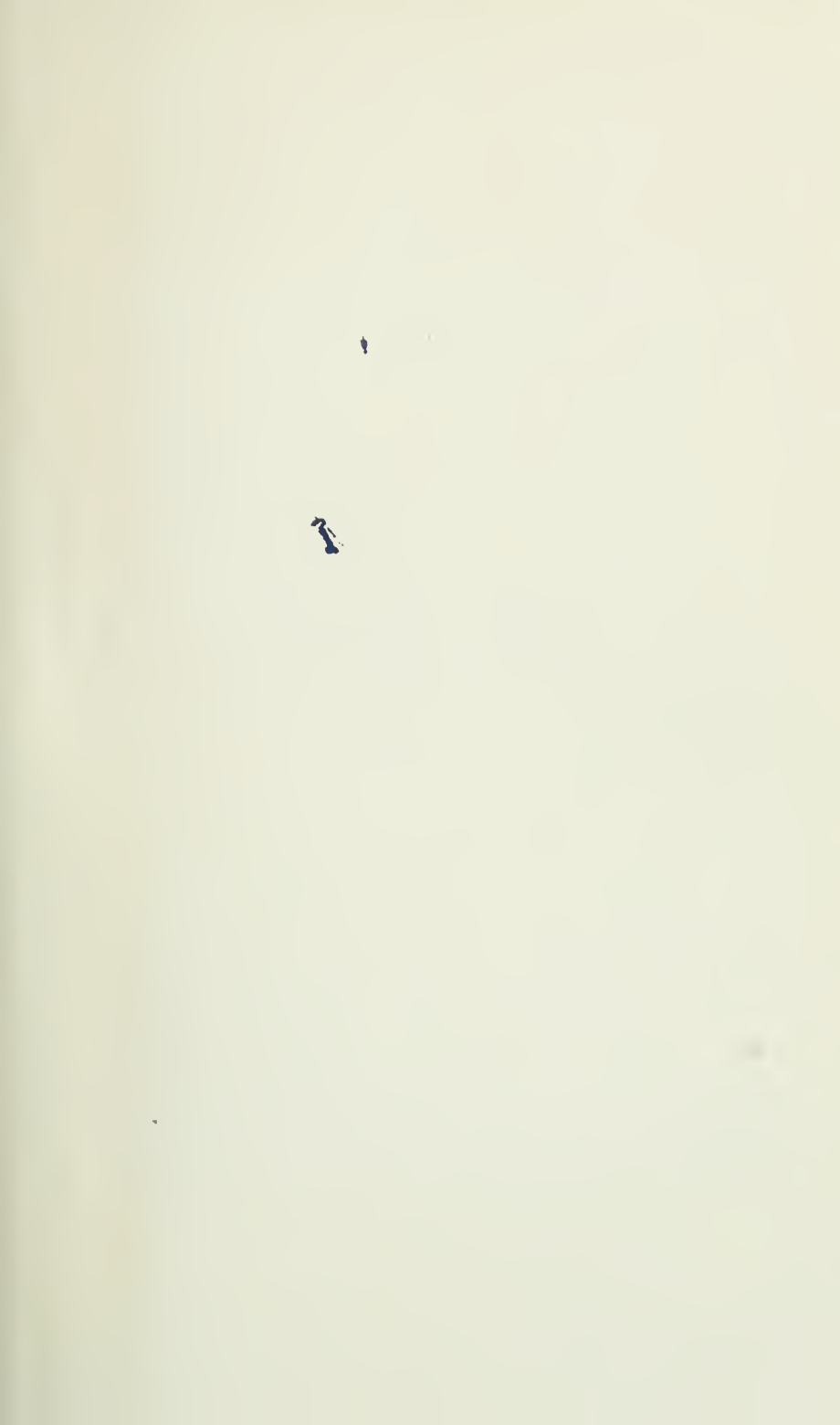
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No. 13097

United States
Court of Appeals
for the Ninth Circuit.

CHARLES A. CRISPIN AND ALMA B.
CRISPIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

NOV 14 1951

No. 13097

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for the Ninth Circuit.

CHARLES A. CRISPIN AND ALMA B.
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,

Attorneys for Appellee.

In the United States District Court for the
Northern District of California

29210-H

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES A. CRISPIN and
ALMA B. CRISPIN,
Defendants.

COMPLAINT

Now Comes the plaintiff in the above-entitled action, by Frank J. Hennessy, United States Attorney, and for claim against the defendants, alleges as follows:

I.

During all times hereinafter mentioned the plaintiff was and is now a corporation sovereign and body politic.

II.

During all times hereinafter mentioned the defendants were husband and wife and they reside at or near Los Gatos, Santa Clara County, California.

III.

This action was authorized by the Commissioner of Internal Revenue of the United States Treasury Department; and is being brought under the direction of the Attorney General of the United States.

IV.

On October 13, 1947, the plaintiff refunded federal income taxes for the calendar year 1943, to the defendants in the amount of \$261.24 and paid interest to them thereon in the amount of \$56.95, making a total amount of \$318.19.

V.

On February 11, 1948, the plaintiff refunded federal income taxes for the calendar year 1944, to the defendants in the amount of \$251.34 and paid interest to them thereon in the amount of \$45.24, making a total amount of \$296.58.

VI.

No part of either of the refunded amounts of \$261.24 and \$296.58 was an overpayment of the income taxes of the defendants for the years 1943 and 1944. On the contrary, the whole of said refunds and interest payments were erroneously made and thereupon the defendants became indebted to the plaintiff in the amount of \$614.77.

VII.

On or about August 3, 1949, the plaintiff made demand upon the defendants for the repayment of the whole of said amount of \$614.77 as taxes refunded and interest paid to the defendants for said years 1943 and 1944. No part of said amount has been repaid.

Wherefore, the plaintiff demands judgment

against the defendants for the full amount of \$614.77 and interest thereon as allowed by law.

/s/ FRANK J. HENNESSEY,
United States Attorney.

By /s/ C. ELMER COLLETT,
Assistant U. S. Attorney.

[Endorsed]: Filed October 13, 1949.

[Title of District Court and Cause.]

ANSWER

Defendants appear and answer the complaint as follows:

I.

Defendants admit the allegations of paragraphs I, II, IV, V, and VII of the complaint.

II.

Having neither belief nor information sufficient to form a belief, defendants deny the allegations of paragraph III of the complaint.

III.

Defendants deny each and every allegation in paragraph VI of the complaint.

Wherefore, defendants pray that plaintiff take nothing by its suit, and for their costs incurred.

/s/ VALENTINE BROOKES,

/s/ ARTHUR H. KENT,

Attorneys for defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed October 21, 1949.

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER

Defendants, United States citizens residing in California, have contested the right of the United States to recover an alleged erroneous refund of taxes from them. The dispute concerns certain funds which defendants received pursuant to an annuity policy which defendant Charles A. Crispin obtained by reason of his employment with the Standard-Vacuum Oil Company.

Prior to January 1, 1941, defendants were residents of China, where Charles A. Crispin was employed by Standard-Vacuum Oil Company in China until his retirement. He participated in a group annuity plan of his employer under which an annuity contract was purchased for him. The employer and employee both made annual contributions. Crispin contributed \$2,156 toward the cost; his employer contributed \$30,631.68. The entire cost was paid when defendant Charles Crispin became

eligible to retire on September 17, 1940, on which date his rights became fixed and non-forfeitable. Until retirement, Crispin had no vested right to the employer's contributions.

Under the retirement plan October 1, 1940, was the certificate anniversary. Receipt of the annuity payments was to begin as soon after that date as defendant Crispin retired. This he did on January 1, 1941.

For the years 1943 and 1944, defendants received annuities of \$2,869.32 per year. They computed their income taxes upon the taxable portion of their annual receipts as if the cost of the annuity contracts were \$2,156.00, such sum representing the actual contribution of Charles A. Crispin. Thereafter they filed refund claims on the theory that the cost of the contracts included the employer's contributions, as well as those of Crispin. Plaintiff allowed refunds, but commenced timely action to recover the refunds. This action was brought under the provisions of Sections 3740 and 3746 (b) of the Internal Revenue Code for recovery of an erroneous refund.

Plaintiff contends that under Internal Revenue Code Sections 22(a) and 22 (b) (2) (B) defendants are not entitled to exclude the sums paid by the employer for the annuity policy. (26 U.S.C.A. 22 (a), (22 (b) (2) (B))¹. The United States

¹“(B) Employees' Annuities. — If an annuity contract is purchased by an employer for an employee under a plan with respect to which the employer's contribution is deductible under section

asserts that the \$30,631.68 paid by the employer is not a part of the cost of the annuity to the employee and cannot be used by him to compute the employee's cost of the annuity.

In the action brought by Charles L. Jones, 2 T. Ct. 924, analysis of this problem was made in an opinion which ruled in favor of the Government. The only distinction between the instant case and that of Charles L. Jones is the place of residence of the taxpayer. Defendants, as residents of China during the years of their employer's contribution to the annuity, were tax exempt. It is their view that this circumstance is sufficient to warrant the Court in making a different ruling from that of the Tax Court in the Jones case.

23 (p) (1) (B), or if an annuity contract is purchased for an employee by an employer exempt under section 101 (6), the employee shall include in his income the amounts received under such contract for the year received except that if the employee paid any of the consideration for the annuity, the annuity shall be included in his income as provided in subparagraph (A) of this paragraph, the consideration for such annuity being considered the amount contributed by the employee. In all other cases, if the employee's rights under the contract are nonforfeitable except for failure to pay future premiums, the amount contributed by the employer for such annuity contract on or after such rights become nonforfeitable shall be included in the income of the employee in the year in which the amount is contributed, which amount together with any amounts contributed by the employee shall constitute the consideration paid for the annuity contract in determining the amount of the annuity required to be included in the income of the employee under subparagraph (A) of this paragraph."

In view of the fact that defendant Charles A. Crispin's right to the annuity did not become non-forfeitable until October, 1940, the Court deems the distinction immaterial. The fact that the defendant resided in China prior to 1941, and was thereby exempt from income tax has no bearing on the issue. In fact, if he were, during those years, a resident of the United States, the payments made by the employer would not be income and were not includible in gross income. While the factual differences between the Jones and the instant case establish the equitable standing of present defendants as opposed to Jones—a United States resident who had never paid taxes on the controverted sum—, they do not constitute the basis for a different ruling.

The recent decision of *Ella B. Higgs*, 16 T. Ct., Case No. 2, decided January 8, 1951, is consistent with and follows the ruling made in the case of *Charles L. Jones*, *supra*.

In the light of the above-cited interpretations of the relevant sections of the Internal Revenue Code, this Court holds that the cost of the annuity to the defendant Charles Crispin was limited to his own contribution of \$2,156.00. The contributions made by Standard-Vacuum Oil Company in the amount of \$30,631.68 were and are taxable when received and cannot be considered a part of the cost of the annuity.

Accordingly, judgment shall be entered in favor of the plaintiff in the amount prayed, upon prepara-

tion of findings of fact and conclusions of law consistent with this decision.

Dated May 1, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed May 1, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case came on regularly to be heard on December 27, 1950, before the Honorable George B. Harris, District Judge, presiding without a jury. The plaintiff was represented by its attorneys Frank J. Hennessy, United States Attorney, and Macklin Fleming, Assistant United States Attorney, and the defendants by their attorneys Arthur H. Kent and Valentine Brookes. The case was submitted on a stipulation of facts, oral and written evidence and argument of counsel. The court having been fully advised in the premises and having delivered a written opinion, now makes the following Findings of Fact and Conclusions of Law:

I.

That the defendants were residents of Los Gatos, Santa Clara County, California, at the commencement of the suit.

II.

That this action was authorized by the Commissioner of Internal Revenue and directed to be brought by the Attorney General of the United States under the provisions of Internal Revenue Code Sections 3740 and 3746 (b).

III.

That the defendant Charles A. Crispin was employed by Standard-Vacuum Oil Co. from 1930 to 1941, and resided continuously in China during this period of time.

IV.

That defendant Charles A. Crispin participated in a group annuity plan of his employer whereby both employer and employee made contribution to the Metropolitan Life Insurance Company.

V.

That Charles A. Crispin contributed \$2,156.00 toward the cost of the annuity, while the employer contributed \$30,631.68.

VI.

That under the retirement plan defendants' rights to the annuity became fixed and nonforfeitable when defendant Charles A. Crispin became eligible to retire, and payment to defendants of the annuity payments was to begin as soon after the certificate anniversary date as defendant Charles A. Crispin actually retired. The certificate anniversary date was October 1, 1940.

VII.

That on September 17, 1940, Charles A. Crispin became eligible to retire, which retirement was scheduled to be on January 1, 1941, and on which date he actually retired.

VIII.

That due to military operations, American civilians were evacuated from China and defendants arrived in the United States on December 10, 1940.

IX.

That during the calendar year 1943, defendants received the sum of \$2,869.32, pursuant to the terms of the aforementioned annuity agreement, and the full amount thereof was included in their income tax return for the year 1943, in computing gross income. The resulting tax in the sum of \$421.91, was paid to the Collector of Internal Revenue for the First Collection District of California.

X.

That on January 20, 1947, defendants filed an amended income tax return for the calendar year 1943, and included the sum of \$983.63 as taxable income received under the annuity agreement in computing gross income for the taxable year. Upon filing a claim, the sum of \$261.64 plus interest of \$56.95, or a total of \$318.19, was refunded to the defendants by the Collector of Internal Revenue on October 13, 1947.

XI.

That during the calendar year 1944, defendants received the sum of \$2,869.32 pursuant to the terms of the aforementioned annuity agreement, and the full amount thereof was included in their income tax return for the year 1944, in computing gross income. The resulting tax in the sum of \$251.34 was paid to the said Collector.

XII.

That on December 4, 1947, defendants filed an amended income tax return for the calendar year 1944, and included the sum of \$983.63 as taxable income received under the annuity agreement, in computing gross income for the year 1944. Upon filing a claim, the sum of \$251.34 plus interest of \$45.24, or a total of \$296.58, was refunded to the defendants by the said Collector on February 11, 1948.

XIII.

That this action was commenced on October 13, 1949.

Conclusions of Law

I.

That the sums paid by Standard-Vacuum Oil Company for the annuity are not a part of the cost of the annuity to defendants.

II.

That the sums paid by the employer were not income to the defendants when made, and defendants did not have a vested interest in these payments until actual retirement.

III.

That the cost of the annuity to defendant Charles A. Crispin is limited to his actual contributions of \$2,156.00.

IV.

That the refunds made to defendants for the calendar years 1943 and 1944, were erroneous and should be returned to plaintiff.

Now, Therefore, it is order and adjudged that plaintiff recover the sum of \$614.77 plus interest as provided by law and costs of suit incurred.

Dated this 19th day of June, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

Approved as to Form:

VALENTINE BROOKES &
ARTHUR H. KENT,

By /s/ VALENTINE BROOKES,
Attorneys for Defendants.

[Endorsed]: Filed June 19, 1951.

The United States District Court, Northern
District of California, Southern Division

No. 29210-M

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES A. CRISPIN and
ALMA B. CRISPIN,
Defendants.

JUDGMENT

The within cause came on regularly to be heard in the above-entitled court, the Honorable George B. Harris, Judge, presiding without a jury. Plaintiff appeared by its attorneys, Frank J. Hennessy, United States Attorney, and Macklin Fleming, Assistant United States Attorney, and defendants appeared by their attorneys, Arthur H. Kent and Valentine Brookes. The Court having heard the facts and argument presented and having heretofore made and caused to be filed herein its Memorandum Opinion and Findings of Fact and Conclusions of Law,

Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff have and recover judgment from the defendants in the sum of \$614.77 plus interest as provided by law; and that costs be assessed in favor

of plaintiff and against defendant by the Clerk of
this Court in the sum of \$.

Dated this 19th day of June, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

Approved as to Form:

VALENTINE BROOKES &
ARTHUR H. KENT,

By /s/ VALENTINE BROOKES,
Attorneys for Defendants.

[Endorsed]: Filed June 19, 1951.

Entered June 20, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Charles A. Crispin
and Alma B. Crispin, defendants above named,
hereby appeal to the United States Court of Ap-
peals for the Ninth Circuit from the final judgment
entered in this action on June 20, 1951.

Dated August 15, 1951.

/s/ ARTHUR H. KENT,
/s/ VALENTINE BROOKES,
Attorneys for Defendants, Charles A. Crispin and
Alma B. Crispin.

[Endorsed]: Filed August 15, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the Appellants and Appellees:

Complaint.

Answer.

Stipulation of facts.

Memorandum opinion and order.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Cost bond on appeal.

Statement of points to be relied on.

Designation of contents of record on appeal.

Appellee's designation of record on appeal.

Plaintiff's exhibits 1 to 7.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 13th day of September, 1951.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13097. United States Court of Appeals for the Ninth Circuit. Charles A. Crispin and Alma B. Crispin, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 13, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13097

CHARLES A. CRISPIN & ALMA B. CRISPIN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS TO BE RELIED ON
AND DESIGNATION OF RECORD

Pursuant to Rule 19 (6) of the Rules of Practice of this Court, appellants state the points on which they intend to rely on this appeal, as follows:

1. The District Court made an error of law in holding that the aggregate consideration paid for appellants' annuity, for the purposes of Internal Revenue Code Section 22 (b) (2), does not include the consideration paid for that annuity by the employer, Standard-Vacuum Oil Company.

2. The District Court made an error of law in failing to hold that the cost of appellants' annuity for purposes of Internal Revenue Code Section 22 (b) (2), referred to therein as "aggregate consideration paid," was the sum of \$32,787.68.

Appellants designate as constituting all the material portions of the record, the following:

1. The Memorandum Opinion and Order of

United States District Judge George B. Harris,
filed May 1, 1951;

2. The Findings of Fact and Conclusions of
Law, filed by said Judge on June 19, 1951; and

3. The Judgment, entered on June 20, 1951.

4. Notice of Appeal.

5. Clerk's Certificate.

Dated San Francisco, California, September 18,
1951.

/s/ ARTHUR H. KENT,

/s/ VALENTINE BROOKES,

Attorneys for Appellants.

[Endorsed]: Filed September 19, 1951.

No. 13,097

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES A. CRISPIN and ALMA B. CRISPIN,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

ARTHUR H. KENT,
VALENTINE BROOKES,
1720 Mills Tower, San Francisco 4, California,
Attorneys for Appellants.

FILED

DEC - 6 1951

PAUL P. O'BRIEN
CLERK

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No. 13,097

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHARLES A. CRISPIN and ALMA B. CRISPIN,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

**Appeal from the United States District Court for the Northern
District of California, Southern Division.**

APPELLANTS' OPENING BRIEF.

STATEMENT RESPECTING JURISDICTION.

This is an action by the United States against appellants under the provisions of Internal Revenue Code Section 3746(a). It was instituted in the United States District Court for the Northern District of California. The cause of action alleged was for the recovery of assertedly erroneous refunds of income tax made to appellants on October 13, 1947 and February 11, 1948. The complaint was filed on October 13, 1949. (R. 3-5.) An answer was filed on October 21, 1949. (R. 5-6.)

Judgment was entered for plaintiff on June 20, 1951. The notice of appeal was filed, pursuant to Rule

73(a) of the Federal Rules of Civil Procedure, on August 15, 1951. (R. 16.)

Appellants reside in Los Gatos, California. (R. 10.)

STATEMENT OF THE CASE.

The facts in this case are as follows:

Appellants are United States citizens, now residing in Los Gatos, California. (R. 6, 10.) Prior to January 1, 1941, they were residents of China. (R. 6, 11.) Appellant Charles A. Crispin was employed in China by Standard-Vacuum Oil Company until his retirement on January 1, 1941. (R. 6-7, 11-12.)¹ He participated in a retirement plan of his employer under which an annuity contract was purchased for him from the Metropolitan Life Insurance Company. (R. 6-7, 11-12.) Appellant contributed \$2,156.00 toward the cost of this annuity, and his employer contributed \$30,631.68. (R. 6, 11.) The contributions to the cost were paid in annual installments and were completed by September 17, 1940. (R. 6-7.) Appellant became eligible to retire on September 17, 1940, and under the terms of the annuity contract his rights thereto became fixed and nonforfeitable on that date. (R. 7, 11-12.)

In each of the years 1943 and 1944, appellant received \$2,869.32 as an annuity under the annuity con-

¹Appellant Alma B. Crispin is involved because she and Charles filed joint returns. All the facts relate to Charles. Therefore we shall hereinafter refer to Charles simply as "appellant".

tract. (R. 7, 12.) The full amount of these receipts was included as income in appellants' joint return and a tax was paid thereon. (R. 7, 12.) Refund claims were later filed and refunds were made to them in the amount of \$318.19, including interest, for 1943, and \$296.58, including interest, for 1944. (R. 12-13.) Within two years thereafter, the United States instituted this action for the recovery of those refunds. (R. 3-5.) Judgment was entered for the United States and within sixty days defendants filed their notice of appeal. (R. 15-16.)

The issues involved on this appeal are of law. The Court below misinterpreted Internal Revenue Code Sections 22(a), 22(b)(2)(A), and 116(a), and entered a judgment for plaintiff which is not supported by the findings of fact.

SPECIFICATIONS OF ERROR.

1. The District Court made an error of law in holding that the aggregate consideration paid for appellants' annuity, for the purposes of Internal Revenue Code Section 22(b)(2)(A), does not include the consideration paid for that annuity by the employer, Standard-Vacuum Oil Company. (R. 19.)

2. The District Court made an error of law in failing to hold that the cost of appellants' annuity for purposes of Internal Revenue Code Section 22(b)(2)(A), referred to therein as "aggregate consideration paid," was the sum of \$32,787.68. (R. 19.)

SUMMARY OF ARGUMENT.

When appellant returned to the United States in 1941, he owned an annuity contract. His rights under it had become fixed and nonforfeitable in the prior year, when he was still a nonresident of the United States. He had earned that annuity contract by his services performed for his employer while he was a nonresident, and complete ownership of the contract vested in him while he was a nonresident.

In these circumstances, the receipt by appellant of the annuity contract constituted additional compensation to him, and therefore was income. However, the income became his while he was a nonresident and therefore was not taxable under Internal Revenue Code Section 116(a). It should not be taxed to him in a subsequent year.

Internal Revenue Code Section 22(b)(2)(A), which governs the taxation of annuity receipts, does not attempt to tax appellant on income which became his while he was an exempt nonresident. It does not tax so much of each year's receipts as merely constitute a return of the "aggregate * * * consideration paid for such annuity," and it has been recognized that the employer's contributions are part of the "aggregate * * * consideration paid" wherever those contributions or what they purchased became income to the annuitant. Since that is the case here, appellant is not taxable on so much of the receipts after his retirement which are merely a payment to him of his employer's contributions.

ARGUMENT.**I. APPELLANT'S ANNUITY RECEIPTS ARE TAXABLE AS PROVIDED IN INTERNAL REVENUE CODE SECTION 22(b)(2)(A).**

Appellant received \$2,869.32 in 1943 and an identical amount in 1944 under an annuity contract with Metropolitan Life Insurance Company. (R. 11-12.) The cost of the contract was \$32,787.68, of which appellant paid \$2,156.00 and his employer paid \$30,631.68. (R. 11.) These payments had been made in annual installments over a period of years up to and including 1940 during appellant's employment abroad. (R. 6,11.)

Annuity receipts are taxable as provided in I.R.C. Section 22(b)(2)(A) and (B) [Appendix, *infra*, pp. ii, iii, iv]. Subdivision (B) thereof has no application to this case, because it is part of an elaborate statutory plan which was not enacted until 1942 and which is without application to annuity contracts which vested in the employee before that date. *Hackett v. Commissioner* (1946, C.A. 1), 159 F. 2d (2d) 121, 125; *Oberwinder v. Commissioner* (1945, C.A. 8), 147 F. (2d) 255, 259; Revenue Act of 1942, Sec. 162(d). Moreover, on its face subdivision (B) has no application to annuities where the employer's contribution was not deductible under Section 23(p)(1)(B), a provision not in existence prior to 1942, except where the employer is exempt under Section 101(6). Therefore subdivision (A) is the controlling provision.

Subdivision (A) establishes the so-called 3 per cent rule. Under this rule, the yearly annuity receipts are treated as taxable income each year only to the ex-

tent they equal 3 per cent of the "aggregate premiums or consideration paid for" the annuity, and the remainder of the annual annuity receipts are treated as non-taxable return of capital. When the total of the amounts so excluded from tax as return of capital "equals the aggregate premiums or consideration paid for such annuity", the remaining annuity receipts become fully taxable.

The dispute here is whether the "aggregate premiums or consideration paid for such annuity" are \$32,787.68 as contended by appellant, or are only \$2,156.00, as appellee contends. This in turn depends on whether the portion of the "aggregate * * * consideration" paid by the employer is includible in the quoted term. Appellant's position is that the employer's contributions are includible in that term. If appellant is wrong, then by 1943 and 1944 he had entirely recovered his cost and the entire annuity receipts of those years are taxable. If appellant is right, \$983.63 of each year's annuity receipts is taxable income and the balance is excludible as a return of capital. In this event, the refunds were proper and not erroneous, and judgment below should have been for appellant.

II. THE EMPLOYER'S CONTRIBUTIONS TO THE PURCHASE PRICE OF THE ANNUITY ARE PART OF THE "AGGREGATE CONSIDERATION" UNDER SECTION 22(b)(2)(A).

As noted in the previous division of this brief, this case revolves about the question whether the employer's contributions to the cost of the annuity contract

are included within the phrase "aggregate premiums or consideration paid for such annuity," under I.R.C. Section 22(b)(2)(A).

1. Textually, of course, the quoted term is sufficiently broad to include the employer's contributions regardless of the circumstances in which they were made. The "aggregate * * * consideration" means the total consideration paid for the annuity, which in this case is \$32,787.68. The question immediately arises whether this ends the matter.

While the language of the statute is unqualified and speaks of no exceptions, it has been held that some exceptions should be read into it. In *Charles L. Jones v. Commissioner* (1943), 2 T.C. 924, the Tax Court held, after consideration of the legislative history of this provision, that the term "aggregate * * * consideration" included contributions of the employer in the nature of compensation only where the employee had been in receipt of income on account of those contributions. We need not challenge that decision to prevail here, as we shall demonstrate. It is not correct to conclude, as the Court below evidently did, that because this qualification exists the instant case is disposed of.

2. The payment by the employer of the bulk of the purchase price for this annuity contract was either a gift to appellant or was additional compensation. The findings do not disclose which it was.² If it was a

²This action is by the United States for the recovery of an erroneous refund, under I.R.C. Sec. 3746(a). The statute gives the government none of the usual assistance, such as presumptions in its

gift, the employer's contribution is part of the "aggregate * * * consideration." This is the settled rule. *MacArthur v. Commissioner* (1948, C.A. 8), 168 F. (2d) 413; *Title Guarantee & Trust Co.* (1939), 40 B.T.A. 475, 482. Indeed, the rule could not be otherwise. The purpose of the 3 per cent rule is to isolate and tax the interest element in the annuity receipts and to permit the annuitant's capital to return to him untaxed. Capital acquired by gift is recognized as capital for income tax purposes. Section 22(b)(3); Section 113(a)(2). Accordingly, as the cited cases hold, a donor's contribution to the cost of an annuity contract is part of the "aggregate * * * consideration paid for such annuity."

3. If the employer's contributions were not a gift to appellant, it is because they were additional compensation for services rendered. We do not argue that they were a gift. We think they were compensation for services, and would be construed to be so even under *Bogardus v. Commissioner* (1937), 302 U.S. 34, and certainly so under *Commissioner v. Smith* (1945), 324 U.S. 177. Cases such as *Oberwinder v. Commissioner* (1945, C.A. 8), 147 F. (2d) 255, 258, and *Hackett v. Commission* (1946, C.A. 1), 159 F. (2d) 121, 123, treat the purchase of annuity contracts by the employer for the employee as additional com-

favor. The United States, being plaintiff, therefore has the burden of proof. *U. S. v. Wood* (1935, CA 3), 79 F.2d 286, 287; *U. S. v. Brown, Inc.* (1938, S.D. N.Y.), 22 A.F.T.R. 1249, 38-1 USTC 9131; *Group No. 1 Oil Corp. v. Thomas* (1943, N.D. Tex.), 32 A.F.T.R. 1663, 43-1 USTC 9448. Therefore the penalty for any informity in the findings is on appellee.

pensation as a matter of law. In view of the *Smith* case, we do not see how that understanding can be questioned. Accordingly, we do not argue that the employer's contributions were a gift.

However, the Courts have recognized that where the employer's contributions to the purchase price of the annuity contract constitute additional compensation to the employee, they become part of the "aggregate premiums or consideration paid for such annuity" under Section 22(b)(2)(A). In *Hackett v. Commissioner* (1945), 5 T.C. 1325, 1331-1333, affirmed (1946, C.A. 1), 159 F. (2d) 121, 123-125, both the Tax Court and the Court of Appeals for the First Circuit so held. In *Freeman v. Commissioner* (1945), 4 T.C. 582, the Tax Court so held without an appeal being taken. Even *Jones v. Commissioner*, discussed both above and in the succeeding division of this brief, which is the case relied on below, recognizes this much.

The only qualification which can exist to this rule is in such circumstances as to render the additional compensation not properly includible in the income of the employee. This could be the situation only where the employee never received ownership of fixed, non-forfeitable rights to the additional compensation. If, for example, the payments by the employer are applied to purchase a contract as to which the employee's rights are entirely contingent on his remaining in the employ for a specified number of years, it can be said that the employee receives no income from the employer's payments, *at that time*. But when the con-

tingencies are removed and the employee's ownership vests, he has received the additional compensation. At that point there is no longer any basis for excluding the employer's contributions to the cost of the contract from the "aggregate * * * consideration paid."

Accordingly, the law can be taken to be that the employer's contributions to the purchase price of the annuity contract are part of the "aggregate consideration" for purposes of Section 22(b)(2)(A) if the employees received them as additional compensation so that they entered into his income, either when they were paid or when his rights to what they bought became fixed and nonforfeitable.

As we shall now demonstrate, appellant received income from his employer's contributions no later than 1940, when he acquired fixed, nonforfeitable ownership of the property they had purchased.

III. THE ANNUITY CONTRACT BECAME INCOME TO APPELLANT NO LATER THAN 1940.

Section 22(a), I.R.C. [Appendix, *infra*, p. i], defines gross income in the broadest possible terms,³ and specifically includes the following:

"* * * compensation for personal service * * *
of whatever kind and in whatever form paid,
* * *."

³It has been said that this definition is as broad as the meaning of "income" in the Sixteenth Amendment itself. *Helvering v. Clifford* (1940), 309 U.S. 331, 334; *Helvering v. Stuart* (1943), 317 U.S. 154, 169.

Words could not be plainer, and consistently with their clarity and scope the Courts have held that compensation for personal services is taxable income even though received in all sorts of unusual forms.

Examples of the broad sweep of this rule, to be found in the cases, are these: the rental value of a dwelling occupied by a corporate officer is taxable as compensation for services (*Chandler v. Commissioner* (1941, C.A. 3), 119 F. (2d) 723; *Dean v. Commissioner* (1947), 9 T.C. 256, 267); the value of the use by the employee of the employer's automobile for personal pleasure is compensation for services which is properly includible in the employee's income (*Rodgers Dairy Co. v. Commissioner* (1950), 14 T.C. 66, 73-74); the payment to the United States by the employer of the employee's income taxes is additional compensation taxable as income of the employee (*Old Colony Trust Co. v. Commissioner* (1929), 279 U.S. 716); the payment by the employer of premiums on insurance policies taken out by the employer on the life of the employee is income to the employee wherever the employee or his family is named as beneficiary⁴ (*Commissioner v. Bonwit* (1937, C.A. 2), 87 F. (2d) 764, cert. den. 302 U.S. 694; *Canady v. Guitteau* (1936, C.A. 6), 86 F. (2d) 303; *Yuengling v. Commissioner* (1934, C.A. 3), 69 F. (2d) 971; *Adams v. Commissioner* (1929), 18 B.T.A. 381; *Danforth v. Commissioner* (1929), 18 B.T.A. 1221); sums withheld from the em-

⁴This statement has been held not to apply to group life insurance, since it is taken out without the consent or participation of the employee. *Adams v. Commissioner* (1929), 18 BTA 381, 383, 384.

ployee's salary under statutory authority and without his consent and paid to a retirement fund for application to his account are income to the employee (*Miller v. Commissioner* (1944, C.A. 4), 144 F. (2d) 287). This rule has even been carried to the point where the saving on the purchase of stock pursuant to an option is taxable as income from personal services where the option was granted as compensation for personal services (*Commissioner v. Smith* (1945), 324 U.S. 177). The Supreme Court, in this last case, said (324 U.S. 18):

“Section 22(a) * * * is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected.” (Citing *Old Colony Trust Co. v. Commissioner*, cited above.)

In view of these indications of the broad sweep of the rule, it is hardly surprising that the receipt by an employee of property rights, in the form of annuity contracts, paid for by the employer, has been held to give rise to taxable income. Any other result would be an insupportable departure from the rule of the statute as exemplified by the foregoing cases. Accordingly, we find that the value of annuity contracts purchased by the employer for the employee has been held taxable to the employee in the year his ownership of the contracts became fixed and nonforfeitable. *Oberwinder v. Commissioner* (1945, C.A. 8), 147 F. (2d) 255; *Hubbell v. Commissioner* (1945, C.A. 6), 150 F.

(2d) 516; *Hackett v. Commissioner* (1946, C.A. 1), 159 F. (2d) 121; *Ward v. Commissioner* (1947, C.A. 2), 159 F. (2d) 502; *U. S. v. Drescher* (1950, C.A. 2), 179 F. (2d) 863, cert. den. 340 U.S. 821; *Deupree v. Commissioner* (1942), 1 T.C. 113; *Brodie v. Commissioner* (1942), 1 T.C. 275; *Freeman v. Commissioner* (1945), 4 T.C. 582.

The earliest of these cited cases is the *Deupree* case, and because of its facts it well serves as an introduction to this particular area. Mr. Deupree was a participant in his employer's profit sharing plan. In the taxable year, he directed that his share be used by the employer to buy for him a single premium, non-assignable annuity contract with no provision for surrendering it. This was done. The purchase price of the annuity was held taxable to him, notwithstanding the restrictions on the surrender or assignment of the annuity contract, because his rights were nonforfeitable. The case is thus similar to *Miller v. Commissioner*, supra (1944, C.A. 4), 144 F. (2d) 287.

The cases have proceeded beyond the point of the *Deupree* case. They have held that the receipt by the employee of fixed, nonforfeitable ownership of an annuity contract paid for, in whole or in part, by his employer, constitutes income even where the taxpayer did not have the option to receive cash instead of the contract as he did in the *Deupree* case. *Brodie v. Commissioner* (1942), 1 T.C. 275, so held, and the remainder of the cases listed above are to the same effect.

There are two general methods by which annuity contracts may be purchased: by a single premium or by several annual premiums. The cases have held that the receipt by the employee of a fully paid up single premium annuity contract, purchased by his employer, constitutes taxable income to him, provided his rights under the annuity contract are nonforfeitable. *Brodie v. Commissioner*, supra; *Oberwinder v. Commissioner* (1945, C.A. 8), 147 F. (2d) 255; *Hackett v. Commissioner* (1946, C.A. 1), 159 F. (2d) 121; *Ward v. Commissioner* (1947, C.A. 2), 159 F. (2d) 502; *U.S. v. Drescher* (1950, C.A. 2), 179 F. (2d) 863; *Freeman v. Commissioner* (1945), 4 T.C. 582. In many of these cases the annuity contract was not assignable. See *U. S. v. Drescher*, supra. The important factor stressed in these cases is that the receipt of a nonforfeitable annuity contract is the receipt of a vested economic benefit, which is income just as much as if it were a bond, a block of stock or cash. The fact that payments under the annuity will not begin until some date in the future has no more significance than would the fact a bond, received as compensation, was not due until 1962. As was emphasized in the *Oberwinder* case (147 F. (2d) at 259), and the *Hackett* case (159 F. (2d) at 124), the important thing is that the valuable economic rights received by the employees were nonforfeitable.⁵

⁵We have not found any case in which this Court has considered this area of the law. The nearest approach to it is *Wolfe v. Commissioner* (1948, CA 9), 170 F. 2d 73, cert. den. 336 U.S. 914, affirming without opinion 8 T.C. 689. However, this case did not deal with annuity contracts but involved a funded but apparently revocable promise of the employer. It is therefore inapposite here.

There is no reason in principle or in the statute why the same rule should not be applied to annuity contracts purchased by several annual premiums. The rights received by the employee are the same in either case, and their value, once they become nonforfeitable, will be the same in either case. From the viewpoint of the employee, he is clearly enriched equally in either case, and the method used by his employer in paying for the contract is irrelevant to (1) the fact of his enrichment and (2) the extent of his enrichment.

To illustrate the point, consider the case of an employee for whom the employer agreed to buy a house as additional compensation. If the employer pays the entire purchase price of the house in one lump sum and at once deeds the house to the employee without reservation or restriction, there is no doubt that the receipt of title to the house by the employee is taxable income to him. Suppose instead, however, the employer agrees to buy the house in ten annual installments and, if the employee is still in the employer's service when the house is fully paid for, to deed it to him then. Is it not entirely clear that here too the house constitutes income to the employee when he receives title to it?

This analysis is equally applicable to a bond purchased by the employer for the employee. The delivery to the employee of fixed, nonforfeitable ownership of the bond is the taxable event on which he realizes income, whether the employer purchased the bond in a single lump sum or in annual installments.

The analysis concerning the house and the bond is equally applicable to annuity contracts. In 1940 there was no special provision in the Internal Revenue Code governing the taxability of annuity contracts purchased by employers for employees, and the provisions added in 1942 were not retroactive. *Hackett v. Commissioner*, supra, 159 F. (2d) at 125; *Oberwinder v. Commissioner*, supra, 147 F. (2d) at 259; Revenue Act of 1942, Sec. 162(d).

The Court below, however, decided differently, on the authority of *Jones v. Commissioner* (1943), 2 T.C. 924, supra. There was no attempt below to meet the foregoing analysis or to explain why different considerations should govern the receipt of one type of compensation than governs the receipt of all others. There was merely a mechanical application of the *Jones* case.

We do not quarrel with the justice of the *Jones* decision. But unless it is confined to its facts or interpreted differently than it was understood by the Court below, it is an example of how hard cases do indeed make bad law.

The first point to note in analysis of the *Jones* case is that it was decided before any of the decisions from the courts of appeals which are cited above. Therefore it was decided before the law had crystallized, as it now has, to the effect that the receipt by an employee of an annuity contract paid for in a single premium by the employer constitutes income to the employee. This point is important, because the Tax Court had difficulty making up its mind that this was the law,

and when the *Jones* case was decided the court was not certain that its then very recent *Brodie* decision would not be reversed.⁶ Accordingly it was no time to expect the Tax Court to extend its *Brodie* decision.

The second point to note about the *Jones* case is that the taxpayer's principal argument was that the employer's contributions were part of the cost of the annuity contract which he was entitled to recover tax-free, *regardless* of whether or not the receipt of the annuity contract had been taxable income to the employee. The Tax Court rejected this contention at great length, and held that the employer's contributions were not part of the "cost" the employee is entitled to recoup unless the employee was taxable on those contributions when he acquired ownership of the annuity contract. We have no quarrel with this portion of the *Jones* decision.

If the *Jones* case is interpreted as being a considered decision on the point involved herein, however, we disagree with and ask this Court not to follow that portion of it. On that point, it cannot be reconciled with the *Oberwinder*, *Hubbell*, *Hackett*, *Ward*, and *Drescher* cases, all more recently decided by various courts of appeals.

Unlike the instant case, the *Jones* case involved a resident citizen who performed all his services for his

⁶See the partial account of the Tax Court's meanderings on this subject in *Hubbell v. Commissioner*, *supra*, 150 F. 2d at 521. Furthermore, the Bureau's published rulings were contrary to the result reached in the *Brodie* case until 1951. Compare I.T. 1810 (II-2 CB 70) and I.T. 2891 (XIV-1 CB 50) with I.T. 4041 (1951-1 CB 5).

employer while a resident of the United States. His employer was the same as that of appellant herein, and the retirement plan was the same as that under which appellant herein has retired, although several changes were made in it after Jones retired and before Mr. Crispin did so. Jones became eligible to retire in 1934 and became the vested owner of his annuity contract in that year. Also in that year the employer paid 97 per cent of the cost price of the annuity contract. Jones' contributions were all refunded to him. 2 T.C. at 927. Accordingly, in 1934 the situation insofar as Jones was concerned was to all intents and purposes the same as if in that year the employer had purchased and delivered to him a single premium annuity contract. Accordingly, under the rule that has now been established, the annuity contract was taxable income of Jones in 1934,⁷ and therefore was part of his cost which he was entitled to recover tax-free. The ultimate result reached by the Tax Court was contrary to this. Why?

In seeking to find the answer the Tax Court gave to this question, we find that Jones did not argue that he was taxable on the value of the annuity contract in 1934 when he received it. This is evident from the opinion of the Tax Court at page 931 of 2 T.C. where that court pointed out that neither party

⁷Jones did not report the receipt of the annuity contract in his 1934 income tax return. However, under Bureau rulings I.T. 1810 (II-2 CB 70) and I.T. 2891 (XIV-1 CB 50), issued in 1923 and 1935, respectively, he was not required to. The rulings were not formally overruled until 1951, in I.T. 4041 (1951-1 CB 5).

relied on the *Brodie* and *Deupree* cases (both *supra*), and added:

“Whether a similar conclusion [as in the *Brodie* case] would have been justified if the Commissioner had attempted to include the amount expended by petitioner’s employer in his gross income for the year 1934 is not before us.”

The court then (2 T.C. at 934) concluded that the employer’s contributions could not be a part of the cost of the annuity contract except where they had entered into the employee’s income, and as can be seen Jones was not arguing that his case fitted into that exception.⁸ We are, however, so that we are presenting an issue neither argued nor decided in the *Jones case*.⁹

The actual position taken by the Tax Court in its later decisions on the point we are arguing can be seen from *Freeman v. Commissioner*, *supra* (1945), 4 T.C. 582), and *Hackett v. Commissioner* (1945), 5 T.C. 1325, *aff’d* (1946, C.A. 1), 159 F. (2d) 121.¹⁰

⁸Undoubtedly Jones’ failure to argue that he should have been taxed in 1934 was due to I.R.C. Sec. 3801, which is retroactive to 1932, and under which the 1934 tax probably could have been collectible if held due.

⁹The other Tax Court case cited and relied on by the Court below, *Ella B. Higgs v. Commissioner* (1951), 16 T.C. 16, has nothing to do with this problem. It cited and followed the *Jones* case on another point decided in the *Jones* case, i.e., the cost basis allocable to the survivor feature in survivor annuities. The tax consequences of survivor provisions are not in issue herein.

¹⁰The Bureau has only this year brought its published rulings into line with the *Oberwinder*, *Hackett*, and other such cases. I.T. 4041, 1951-1 CB 5. Whether its indecision in adopting this position is what prompted its action in suing appellant is unknown, but seems a reasonable speculation.

See also *E. T. Sproull v. Commissioner* (1951), 16 T.C. 244, and *Hall v. Commissioner* (1950), 15 T.C. 195, where the same analysis—that for which we argue herein—was applied to compensation paid in property other than annuity contracts. The *Hall* case is especially close to that herein. Two stock certificates were put in escrow in 1942 by a corporate employer, one to be delivered to the employee in 1943 and the other in 1944 if the employee was still in the employ in those years. The employee received the certificates in 1943 and 1944, and was held to have received taxable income in those years. Reduced to its simplest terms, appellant's case is like the *Hall* case. He received income in 1940, when he received fixed and nonforfeitable ownership of the annuity contract.

IV. THE DECISION BELOW FAILS PROPERLY TO GIVE EFFECT TO THE EXEMPTION FROM TAX OF APPELLANT'S EARNINGS DURING THE PERIOD HE WAS A NONRESIDENT.

Section 116(a) of the Internal Revenue Code [Appendix, *infra*, pp. iv, v] exempts from tax the earnings from personal services of nonresident citizens of the United States. Appellant was a nonresident in 1940 when the annuity contract became income to him by reason of his rights to the contract having become fixed and nonforfeitable in that year. He was a nonresident also in the preceding years when he earned the annuity contract, through performing services for which the employer's contributions were made. (R. 6-7, 11.)

It is not our contention that Section 116 exempts appellant's annual annuity receipts. Section 22(b)(2) (A) is the section which has that effect, to the extent they are exempt. But Section 116 did exempt appellant's compensation received in 1940 and earlier years for his services performed while a nonresident. His basic salary, from which his own contributions to the "aggregate * * * consideration" were made, was exempt under Section 116(a). If his employer had contributed toward the cost of a series of single premium annuity contracts, these contracts, while income to him in the year of purchase, would have been exempt. If in 1940 the employer had paid appellant \$30,000.00 in cash as additional compensation and appellant had used the funds to buy the annuity contract he owns, the \$30,000.00 would have been income to him in 1940, but it would have been exempt from tax under Section 116(a).

The inflexible trend of decisions has been to treat the receipt of property the same as the receipt of cash, under Section 22(a). This case should be decided by the application of the same principles. The result which should be reached is the same as that which would be reached if appellant's employer had paid him an extra \$30,631.68 in 1940 for the purpose of enabling him to buy an annuity, and he had bought it.

When appellant returned to the United States to live, one of his assets was the annuity contract. He owned it, without qualification. It was his capital. He had earned it and received it while a nonresi-

dent. To deny that its value then was capital to him is to deny what Section 116(a) manifestly was intended to grant—tax exemption on compensation for personal services performed while a nonresident.

If the *Jones* case, discussed above, retains any vitality as a precedent other than on the exact point the taxpayer there unsuccessfully argued, it must be confined to cases of residents. The policy of the law will not support the complete exemption from tax of annuity contracts received as compensation by residents. It will, however, in the case of nonresidents. The decision below, in failing to give effect to the plain policy of Section 116(a), deprives appellant of its benefit, and does so improperly. Appellant should not now be taxed on capital which became his while he was a nonresident.

CONCLUSION.

The judgment below should be reversed.

Dated, San Francisco, California,

December 3, 1951.

Respectfully submitted,

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Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

INTERNAL REVENUE CODE.

Section 22(a):

(a) *General Definition.* "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly. In the case of judges of the courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income.

Section 22(b)(2)(A) and (B):

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(2) *Annuities, etc.*—

(A) *In General.*—Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this chapter or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the

premiums and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) or this paragraph. The preceding sentence shall not apply in the case of such a transfer if such contract or interest therein has a basis for determining gain or loss in the hands of a transferee determined in whole or in part by reference to such basis of such contract or interest therein in the hands of the transferor. This subparagraph and paragraph (1) shall not apply with respect to so much of a payment under a life insurance, endowment, or annuity contract, or any interest therein, as, under section 22(k), is includible in gross income;

(B) *Employees' Annuities.*—If an annuity contract is purchased by an employer for an employee under a plan with respect to which the employer's contribution is deductible under section 23(p)(1)(B), or if an annuity contract is purchased for an employee by an employer exempt under section 101(6), the employee shall include in his income the amounts received under such contract for the year received except that if the employee paid any of the consideration for the annuity, the annuity shall be included in his income as provided in subparagraph (A) of this paragraph, the consideration for such annuity being considered the amount contributed by the employee. In all other cases, if the employee's rights under the contract are nonforfeitable except for failure to pay future premiums, the amount contributed by the employer for such annuity contract on or after such rights become nonforfeitable shall be included in the income of the employee in the year in which

the amount is contributed, which amount together with any amounts contributed by the employee shall constitute the consideration paid for the annuity contract in determining the amount of the annuity required to be included in the income of the employee under subparagraph (A) of this paragraph.

Section 116(a):

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) *Earned Income from Sources Without the United States.*—

(1) *Foreign Resident for Entire Taxable Year.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income defined in paragraph (3); but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

(2) *Taxable Year of Change of Residence to United States.*—In the case of an individual citizen of the United States, who has been a bona fide resident of a foreign country or countries for a period of at least two years before the date on which he

changes his residence from such country to the United States, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof), which are attributable to that part of such period of foreign residence before such date, if such amounts constitute earned income as defined in paragraph (3); but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

(3) *Definition of Earned Income.*—For the purposes of this subsection, “earned income” means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income producing factors, under regulations prescribed by the Commissioner with the approval of the Secretary, a reasonable allowance as compensation for the personal services rendered by the taxpayer, not in excess of 20 per centum of his share of the net profits of such trade or business, shall be considered as earned income.

No. 13,097

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES A. CRISPIN and ALMA B.
CRISPIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
Northern District of California.

BRIEF FOR THE UNITED STATES.

ELLIS N. SLACK,

Acting Assistant Attorney General,

LEE A. JACKSON,

IRVING I. AXELRAD,

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FILED

JAN 30 1952

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UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
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BRIEF FOR THE UNITED STATES.

OPINION BELOW.

The District Court made findings of fact and conclusions of law. (R. 10-14.) Its memorandum opinion (R. 6-10) is reported at 97 F. Supp. 93.

JURISDICTION.

This appeal involves federal income taxes for the years 1943 and 1944 in the total amount of \$614.77 plus interest. The taxes in controversy for both taxable periods were paid to the Collector of Internal Revenue

for the First Collection District of California. (R. 12-13.) After receipt of a claim for refund for the year 1943 the sum of \$261.64 plus interest of \$56.95 was refunded to the taxpayers by the Collector on October 13, 1947. (R. 12.) Similarly, upon the receipt of a claim for refund for 1944 refund was made to the taxpayers by the Collector on February 11, 1948, in the amount of \$251.34 plus interest of \$45.24. (R. 13.)

Within the period of the statute of limitation as provided in Section 3746(b) of the Internal Revenue Code and on October 13, 1949, this action for erroneous refund was instituted by filing a complaint (R. 3-5, 13) in the District Court of the United States for the Northern District of California. The action was authorized by the Commissioner of Internal Revenue and directed to be brought by the Attorney General under Code Sections 3740 and 3746(b). (R. 11.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1345.

Judgment was entered for the United States on June 19, 1951. (R. 15-16.) Within sixty days and on August 15, 1951, a notice of appeal was filed. (R. 16.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether the District Court correctly held that in determining how much of the payments under taxpayer's annuity contract was taxable to him in each of the years 1943 and 1944, the \$30,631.68 which had

been paid by his employer for the contract was not to be treated as "consideration paid" for the annuity within the meaning of the three percent rule provided in Code Section 22(b)(2)(A).

STATUTES AND REGULATIONS INVOLVED.

These appear in the Appendix, *infra*.

STATEMENT.

The facts found by the District Court (R. 10-13) may be summarized as follows:

Charles A. Crispin, hereinafter referred to as the taxpayer,¹ was employed by Standard-Vacuum Oil Company from 1930 to 1941 and resided continuously in China during this period. (R. 11.)

Taxpayer participated in a group annuity plan whereby both employer and employee made contributions to the Metropolitan Life Insurance Company. (R. 11.) Taxpayer contributed \$2,156 toward the cost of the annuity; the employer contributed \$30,631.68. Both taxpayer's and the employer's contributions were made over a period of years. (R. 11.)

Taxpayer's rights to the annuity became fixed and nonforfeitable on September 17, 1940, when he became eligible to retire. Annuity payments under the contract were to begin as soon after the certificate anniversary

¹Alma B. Crispin, taxpayer's wife, is a party because joint returns were filed. For convenience future reference will be made only to Charles.

(October 1, 1940) as taxpayer actually retired. He actually retired on January 1, 1941, having returned to the United States on December 10, 1940. (R. 11-12.)

Taxpayer received pursuant to the terms of the annuity agreement the sum of \$2,869.32 in each of the years 1943 and 1944. (R. 12-13.)

The District Court held, in giving judgment for the United States, that the cost of the annuity to the taxpayer was limited to his actual contribution of \$2,156 and that the sums paid by his employer for the annuity were not a part of the cost to the taxpayer which he was entitled to get back tax exempt under Section 22(b)(2)(A) of the Code. (R. 13-14.)

SUMMARY OF ARGUMENT.

Section 22(b)(2)(A) of the Internal Revenue Code provides that payments under annuities are taxable to the annuitant except that there shall be excluded (subject to the three percent rule) the consideration paid for the annuity. The decided cases and the Committee Reports make clear that the purpose of the exception is to permit the taxpayer to recover his cost tax free and accordingly the consideration excluded must be limited to taxpayer's own contribution.

Because, however, in some circumstances the amount of an employer's contribution to an annuity is taxable income to the annuitant in the year of the contribution, the exception in Section 22(b)(2)(A) has been extended by judicial interpretation to permit

the recovery, tax free, of the amount of the employer's contribution *on which a tax has actually been paid*. This was both an appropriate and a necessary device. It was necessary to avoid double taxation. It was appropriate to effectuate the purpose of the exception in Section 22(b)(2)(A) which as we have seen is to permit an annuitant to recover his cost, free of additional taxes. To the extent that another's contribution had already been taxed to the annuitant, the contribution taxwise was a part of his cost, and should be capitalized in the same manner as taxpayer's own contribution.

Taxpayer's attempt to invoke this principle on the theory that the employer's total contribution of \$30,631.68 made over many years became "income" of the taxpayer in 1940 when the annuity contract first became nonforfeitable misconceives the principle, even if it be assumed that the \$30,631 could have been taxed to him had he been a resident. In 1940 taxpayer was a nonresident of the United States and was, therefore, exempt from tax under Section 116(a). Accordingly he did not pay a tax on the \$30,631.68 and the amount of the employer's contribution did not become a part of either his actual, or tax cost. There is, therefore, no basis in the statute or in the decisions to permit him to recover tax free, as his cost, an item which in fact was not his cost.

Approval of taxpayer's position would incongruously serve to exempt completely from tax on the basis of a rule of law intended merely to avoid double taxation.

ARGUMENT.

TAXPAYER WAS NOT ENTITLED TO EXCLUDE FROM TAXABLE INCOME THAT PORTION OF THE ANNUITY PAYMENTS REPRESENTING AN AMOUNT EQUAL TO HIS EMPLOYER'S CONTRIBUTIONS TO THE COST OF THE ANNUITY CONTRACT BECAUSE THOSE CONTRIBUTIONS, ADMITTEDLY NEVER HAVING BEEN TAXED TO THE TAXPAYER, WERE NOT A PART OF HIS COST.

Section 22(b)(2)(A) of the Internal Revenue Code (Appendix, *infra*) states the general rule that "Amounts received as an annuity under an annuity or endowment contract shall be included in gross income * * *." It provides, as an express exception, that there shall be excluded from gross income the excess of the amount received over an amount equal to three percent of the "consideration paid for such annuity * * * until the aggregate amount excluded * * * equals the aggregate premiums or consideration paid for such annuity." The purpose of the exception is to permit a taxpayer to recoup his cost of the annuity tax free to avoid taxing him on a return of his capital. In doing so, however, Congress recognized that a portion of the payments made each year pursuant to an annuity contract represented increment. Accordingly the rule was adopted that only the excess of the amount over an amount equal to three percent of the consideration paid was to be excluded from income until the total consideration was recovered. See *Manne v. Commissioner*, 155 F. 2d 304, 306 (C.A. 8th); H. Rep. No. 704, 73d Cong., 2d Sess., p. 21 (1939-1 Cum. Bull. (Part 2) 554, 569-570); S. Rep. No. 558, 73d Cong., 2d Sess., p. 23 (1939-1 Cum. Bull. (Part 2) 586, 604); H. Conference Rept.

No. 1385, 73d Cong., 2d Sess., p. 3 (1939-1 Cum. Bull. (Part 2) 627, 628).

The effect of this provision, of course, was to include in income each year three percent of the taxpayer's cost excluding the rest of the annuity payments until the cost was recovered at which time all of the annuity would be taxable. Although, as stated, the self-evident purpose of the tax treatment of annuities in Section 22(b)(2)(A) was to permit the taxpayer to recoup his cost, taxpayers nevertheless argued that the language contained in Section 22(b)(2)(A) was not by its terms limited to consideration paid *by the taxpayer* and, accordingly, approval was sought of the position that they were entitled to recover tax free the total consideration paid for the annuity whether by themselves or by an employer. The result of approval of that position, of course, would be to permit a taxpayer to receive income tax free which never had been taxed and never would be.

There is no reason here, in view of the consistent rejection of this self-evidently unsound position by the Courts, to again explain in the fullest detail why this position is untenable. Suffice it to point out that whenever the question has been before the Courts it has been held that the consideration paid for an annuity which one is entitled to recover tax free (subject to the three percent rule) is only the consideration paid by, or cost to, the taxpayer.² *Wolfe v. Commis-*

²Taxpayer's contributions to his annuity totalling \$2,156 have been excluded from gross income by the Commissioner. (R. 6-7.) The controversy here is over whether taxpayer may also exclude subject to the three percent rule the \$30,631.68 contributed by his employer (R. 6) and on which he has never paid an income tax.

sioner, 8 T.C. 689, 700-701, affirmed *per curiam*, 170 F. 2d 73 (C.A. 9th), certiorari denied, 336 U.S. 914; *Hackett v. Commissioner*, 159 F. 2d 121, 124 (C.A. 1st); *Jones v. Commissioner*, 2 T.C. 924, 933.³

The general rule that annuities are taxable, expressly written into Section 22(b)(2)(A), confirmed the rule that would obtain anyway, that annuities paid to employees for past services constitute compensation for personal services and as such are taxable income. *Noel v. Parrott*, 15 F. 2d 669 (C.A. 4th), certiorari denied, 273 U.S. 754; *Old Colony Tr. Co. v. Commissioner*, 279 U.S. 716; *Lucas v. Ox Fibre Brush Co.*, 281 U.S. 115; *Commissioner v. Bonwit*, 87 F. 2d 764 (C.A. 2nd), certiorari denied, 302 U.S. 694. The interpretation of the exception to the Congressional decision to tax annuities, as applying only to permitting recoupment of the annuity's cost to the taxpayer, is confirmed not only by common sense and all of the cases to consider the question but by the Committee Reports. For example, in H. Rep. No. 704, *supra*, pp. 569-470, the Ways and Means Committee said:

The change [addition of the three percent clause] *continues the policy* of permitting the annuitant to recoup *his original cost tax free* but requires him to include in his gross income a portion of

³Although the *Jones* case was a Tax Court decision it has been recognized as peculiarly authoritative. It was not only a unanimous decision of the full Tax Court, but notwithstanding the large amount involved no appeal was taken. The court below justifiably placed full reliance upon it particularly in view of the fact that the same annuity plan as we have here was there involved. The case is undistinguishable from the instant one. Taxpayer's labored effort to avoid its impact (Br. 16-19) is a position apparently born of desperation. In any event the assertion that the issue here was "neither argued nor decided" there is not true.

the annual payments in an amount equal to three percent of the cost of the annuity. * * * [Italics supplied.]

After some administrative indecision⁴ the Commissioner ultimately took the position that, under certain circumstances, contributions by an *employer* to an employee's annuity contract would be taxable income to the employee in the year when the contribution was made. This result was approved by such decisions as *Hackett v. Commissioner, supra*; *Hubbell v. Commissioner*, 150 F. 2d 516 (C.A. 6th); *Oberwinder v. Commissioner*, 147 F. 2d 255 (C.A. 8th); *Brodie v. Commissioner*, 1 T.C. 275; *Deupree v. Commissioner*, 1 T.C. 113; *Ward v. Commissioner*, 159 F. 2d 502 (C.A. 2d); *United States v. Drescher*, 179 F. 2d 863 (C.A. 2d). In those cases such as this where the employee was not taxed when the contributions were made, the annuity payments when received by the employee constituted his income insofar as it exceeded his own contributions. *Wolfe v. Commissioner, supra*; *Jones v. Commissioner, supra*; and see *Hackett v. Commissioner, supra*.

But a different problem arose in those cases where the employee had already been taxed on his employer's contributions. Obviously to tax him again when he received the annuity payments themselves would constitute a double tax unless the amount on which

⁴See, e.g., I.T. 1810, II-2 Cum. Bull. 70 (1923); I.T. 2874, XIV-1 Cum. Bull. 49 (1935); I.T. 2891, XIV-1 Cum. Bull. 50 (1935); I.T. 2984, XV-1 Cum. Bull. 87 (1936); I.T. 3292, 1939-1 Cum. Bull. 84; I.T. 3346, 1940-1 Cum. Bull. 62.

he had previously paid a tax were excluded from income in the same manner as we have seen was done with his own contributions. This is exactly the approach which the Courts have adopted in attempting to reach a just result in this field. Thus in *Jones v. Commissioner, supra*, we find the Tax Court stating (p. 934) that—

Congress intended to limit the deduction under section 22(b)(2) [now 22(b)(2)(A)], *supra*, to the aggregate premiums or consideration paid by the annuitant except where, as in the *Deupree* and *Brodie* cases, *supra*, the annuitant has been in receipt of taxable income in the year in which the annuity was purchased for him by his employer.

This, the Tax Court pointed out, was in accord with the general rule under the Revenue Acts with respect to basis under Sections 111 and 113 and depreciation and depletion under Section 23(l) and (m). The firmly entrenched principle is that to the extent the employer's contributions have been actually taxed to the annuitant those contributions entered into his tax cost—i.e., taxwise the employer's contributions were to be capitalized by the taxpayer-annuitant—and he is entitled to recover them tax free.

This rule of the *Jones* case was expressly approved by the Court of Appeals for the First Circuit in *Hackett v. Commissioner, supra*. There the taxpayer was attempting to resist a tax imposed on the amount of the employer's contribution to the taxpayer's annuity in the year when the contribution was made,

on the ground that it was properly taxed under Section 22(b)(2)(A) only when the annuity payments were actually made to the taxpayer. In order to deal with this contention the Court was faced with the problem of deciding whether the annuity payments when received in later years would be taxable. It concluded, relying on the Tax Court's decision in the *Jones* case (p. 124) that "we believe that a construction 'paid by the annuitant or by another when such payment is *taxable* income to the annuitant' would be entirely proper." (Italics supplied.)

The next—and only other case to our knowledge—to consider the problem here presented was this Court's decision in *Wolfe v. Commissioner, supra*. As noted, *supra*, this Court affirmed the Tax Court's decision *per curiam* without opinion. This undoubtedly is indicative of how clearly correct this Court viewed the Tax Court's decision. The alternative ground for decision in that case squarely presents the identical issue here raised.⁵ Although the Tax Court had also decided that the amounts received by the taxpayer were not received under an annuity contract it is clear that beginning with the last paragraph on page 700 and continuing through the first full paragraph on page 701 the Court was also deciding alternatively that even if the payments were annuity payments they were taxable because they represented a recovery

⁵Taxpayer deals with this case only with the inaccurate footnote comment (Br. 14) that "this case did not deal with annuity contracts but involved a funded but apparently revocable promise of the employer. It is therefore inapposite here."

of consideration paid by the employer on which no tax was paid since the taxpayer was a nonresident of the United States and exempt under Section 116(a) of the Code at the time of the employer's contribution. The Tax Court pointed out that only the aggregate premiums or considerations paid by the annuitant can be recovered tax free except where, as in situations like *Deupree* and *Brodie*, the taxpayer has actually paid a tax, or in the Tax Court's language, "been in receipt of taxable income in the year in which the annuity was purchased for him by his employer."

It is apparent, then, from the self-evident purpose of Section 22(b)(2)(A), as disclosed by its language and confirmed by its legislative history and as interpreted by every Court to have considered the question, that annuity payments are fully taxable in the year when received except insofar as they represent a return of the taxpayer's cost. Cost may be of two types: (1) Actual consideration paid by the annuitant and (2) the consideration paid by his employer, on which the taxpayer has paid the tax. In this posture of the authorities taxpayer's detailed argument (Br. 5-20) that the employer's contribution to taxpayer's annuity contract totalling \$30,631.68 made over a period of many years became "income" to the taxpayer in 1940 when the contract became nonforfeitable by reason of the taxpayer's having reached retirement age, although not in fact taxable because exempt under Code Section 116(a), is quite irrelevant here, even if otherwise accurate.

Assuming that he is correct in his highly theoretical argument that the contributions by an employer covering a lifetime of employment may be taxed to an employee all in one year even though the tax might exceed by many times his cash income for the year out of which the tax must be paid, it must be noted that no reported case has ever gone so far and to our knowledge the Commissioner has never asserted such a position.⁶ But whether the theoretical proposition

⁶It should be noted in this connection that in Section 22(b)(2)(B) (Appendix, *infra*) Congress provided for years beginning after December 31, 1941 (Section 162(d), Revenue Act of 1942 (Appendix, *infra*)), that in the sentence beginning "In all other cases * * *" (describing the situation here) that only employer's contributions made "on or after such rights [employee's] become nonforfeitable shall be included in the income of the employee in the year in which the amount is contributed * * *." It is further provided that only such amounts shall constitute "consideration paid for the annuity contract" under Section 22(b)(2)(A). These provisions clearly require the nontaxability of the employer's contributions in 1940 even had taxpayer been a resident and the resultant taxation of those contributions when received in the form of annuity payments. That this is so is made explicit by Treasury Regulations 111, Section 29.22(b)(2)-5 (Appendix, *infra*) as follows:

If the employee's rights under the annuity contract in such a case were forfeitable at the time the employer's contribution was made for the annuity contract, *even though they become nonforfeitable later*, the amount of such contribution is not required to be included in the income of the employee, *but any amount received or made available to the employee under the annuity contract shall be includible in the gross income of the employee in the taxable year in which received or made available*, except that if the employee contributed any of the consideration for the annuity, the annuity shall be included in his income to the extent provided in section 29. 22(b)(2)-2. [Italics supplied.]

Whether or not Section 22(b)(2)(B) is otherwise applicable here it is plain that taxpayer's assertion (Br. 5) that the section has no application where the employer's contribution was not deductible under Section 23(p)(1)(B) is simply not so. Since the years involved here are 1943 and 1944 and the section was made effective as of December 31, 1941 (Section 162(d), *supra*), it would seem

be sound or not, it has been authoritatively said that taxation is an "eminently practical matter." *Tyler v. Commissioner*, 281 U.S. 497, 503; *United States v. Jacobs*, 306 U.S. 363, 370. In view of the purpose of Section 22(b)(2)(A) to tax annuity payments as income except insofar as they represent the taxpayer's cost, it is of no moment that the employer's contributions might have been taxed had taxpayer been someone else and lived in the United States. In that supposititious event the employer's contributions taxwise would have been part of taxpayer's cost of the annuity. But the theoretical taxability of the contributions not in fact taxed because of Section 116(a) cannot conceivably in fact affect taxpayer's basis in the annuity. Yet that is the only relevant inquiry.

Taxpayer's assumption that taxing the annuity payments to him after he became a resident takes away part of the immunity granted to him under Section 22(a) as a nonresident (Br. 20-22) has no merit. He assumes, contrary to the statute, that an annuity contract is capital. We have already seen that annuity payments insofar as they exceed a taxpayer's actual cost are income by express provision of the Code.

to apply. But whether strictly applicable or not it seems probable that the nonpension trust provisions of Section 22(b)(2)(B) on which we rely were only declaratory of the old law under Section 22(b)(2)(A) contrary to taxpayer's assertion (Br. 5) and on the basis of the authority which he incorrectly cites for the contrary proposition. *Hackett v. Commissioner*, 159 F. 2d 121, 125 (C.A. 1st). As the court there accurately observed the nonretroactivity of Section 22(b)(2)(B) was obviously directed to the amendments made to Section 165 and Section 23(p) "and thus need not be interpreted as indicative of an intent to change that part of § 22(b)(2) on which our attention is now focused."

Taxpayer raises no constitutional question concerning the propriety of the statutory classification nor could one properly be raised. The suggestion that the equitable administrative device of permitting a taxpayer to recoup tax free contributions of his employer on which he has already paid a tax applies equally to one who did not pay the tax is transparently without merit.

Our position in this respect finds direct support in an analogous line of cases. *Johnson v. Commissioner*, 162 F. 2d 844 (C.A. 5th); *Commissioner v. Farren*, 82 F. 2d 141 (C.A. 10th); *Larkin v. United States*, 78 F. 2d 951 (C.A. 8th). In the *Johnson* case the question was the amount of gain which the taxpayer realized on the sale of real estate. This in turn depended on what the basis of the real estate was to her. She had leased property under a long-term lease and the lessee at his expense had built a building. The lease was terminated in 1929 because of a breach by the lessee and the taxpayer got back both the land and the building. Although not clear at the time, it later became authoritatively established as the result of the decision in *Helvering v. Bruun*, 309 U.S. 461, that the fair market value of the building should have been reported by the taxpayer as her income in the year of termination of the lease. This she had not done. If she had paid the tax on the value of the building just as in the annuity situation here, her basis would have been augmented by the valuation of the building on which she had paid the tax. Her position that she

was nevertheless entitled to the stepped up basis on the sale of the building because in fact the fair market value was income although not in fact taxed is the identical argument made by the taxpayer here. The Fifth Circuit in rejecting taxpayer's contention stated (p. 846) :

Since the value was not then [1929 when the lease was terminated] or since taken into the *tax account as a capital investment*, there is no occasion to add it to the basis of the property when sold to avoid taxing it a second time. Justice has been done.

Similarly, in the situation before us the purpose of excluding the amount of the employer's contribution from annuity payments when received is merely to avoid taxing it a second time. When in fact no taxes have been paid regardless of whether as a theoretical matter income had arisen, there is not only to need to exclude the item from income in order to avoid a second tax but there is no capital tax account which would justify it.

Larkin v. United States and *Commissioner v. Farrow*, *supra*, also fully support our position here. The cases are a little closer on the facts in that the question was the basis of stock which had been secured in the one case at a bargain purchase and in the other at no cash outlay at all, but both in consideration of services rendered. In both cases the law was that the value of the stock in excess of cost to the taxpayer should have reported as income in the year he got title to the stock. This had not been done but the tax-

payers were insisting on the stepped up basis, just as here, on the ground that because they had income in the earlier years their basis was increased. In both cases the respective Courts pointed out that the basis is increased only in recognition of the tax having actually been paid in order to avoid double taxation.

CONCLUSION.

The decision of the District Court is correct and should be affirmed.

Dated, January 28, 1952.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(2) [Amended by Section 120(d) of the Revenue Act of 1942, c. 619, 56 Stat. 798.] *Annuities, etc.*—

(A) *In general.*—

* * * * *

Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this chapter or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. * * *

(B) [Added by Section 162(c) of the Revenue Act of 1942, *supra*] *Employees' annuities.*—If an annuity contract is purchased by an employer for an employee under a plan with respect to which the employer's contribution is deductible under section 23(p) (1) (B), or if an annuity contract is purchased for an

employee by an employer exempt under section 101 (6), the employee shall include in his income the amounts received under such contract for the year received except that if the employee paid any of the consideration for the annuity, the annuity shall be included in his income as provided in subparagraph (A) of this paragraph, the consideration for such annuity being considered the amount contributed by the employee. In all other cases, if the employee's rights under the contract are nonforfeitable except for failure to pay future premiums, the amount contributed by the employer for such annuity contract on or after such rights become nonforfeitable shall be included in the income of the employee in the year in which the amount is contributed, which amount together with any amounts contributed by the employee shall constitute the consideration paid for the annuity contract in determining the amount of the annuity required to be included in the income of the employee under subparagraph (A) of this paragraph.

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

Sec. 162. Pension Trusts.

* * * * *

(d) *Taxable Years to Which Amendments Applicable.*—The amendments made by this section shall be applicable as to both the employer and employees only with respect to taxable years of the employer beginning after December 31, 1941, except that—

* * * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.22(b)(2)-2. *Annuities*.—Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semi-annually, quarterly, monthly, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. Such portion of each installment payment of an annuity (where the whole payment is not required to be included in income under section 22(k)) shall be included in gross income as is not in excess of 3 percent of the aggregate premiums or consideration paid for such annuity, whether or not paid during the taxable year, divided by 12 and multiplied by the number of months in respect of which the installment is paid. As soon as the aggregate of the amounts received and excluded from gross income equals the aggregate premiums or consideration paid for such annuity, the entire amount received thereafter in each taxable year must be included in gross income. Annuities paid to retired employees pursuant to the Civil Service Retirement Act of May 29, 1930, 46 Stat. 468, 475, as amended (5 U.S.C., 1940 ed., ch. 14), are subject to section 22(b)(2), the aggregate premiums or consideration paid for such annuities being the total of the amounts previously withheld from the compensation of the employees.

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Sec. 29.22(b)(2)-5. *Employees' Annuities.*—If an employer purchases an annuity contract on behalf of an employee, including a retired or former employee, under a plan with respect to which his contribution is deductible under section 23 (p)(1)(B) (see section 29.23(p)-9), the employee is not required to include such amount in his income in the taxable year during which such contribution is made. The amount received or made available to such employee under such annuity contract shall be included in gross income of the employee in the taxable year in which received or made available, except that if the employee contributed any of the consideration for the annuity, the annuity shall be included in his income as provided in section 29.22(b)(2)-2, the consideration for the annuity being considered the amount contributed by the employee. If an employer purchases an annuity contract which is not under a plan with respect to which his contribution is deductible under section 23(p)(1)(B), the amount of such contribution shall be included in the income of the employee in the taxable year during which such contribution is made, if the employee's rights under the annuity contract are non-forfeitable, except for failure to pay future premiums, at the time the contribution is made. In such case, the total amount of such contributions required to be included in the income of the employee together with any amounts contributed by him will constitute the consideration paid for the annuity contract in determining the amount of the annuity required to be included in the income of the employee under section

22(b)(2)(A). If the employee's rights under the annuity contract in such a case were forfeitable at the time the employer's contribution was made for the annuity contract, even though they become nonforfeitable later, the amount of such contribution is not required to be included in the income of the employee, but any amount received or made available to the employee under the annuity contract shall be includible in the gross income of the employee in the taxable year in which received or made available, except that if the employee contributed any of the consideration for the annuity, the annuity shall be included in his income to the extent provided in section 29.22(b)(2)-2. The fact that an employee may not live a sufficient length of time to enjoy any benefits under the annuity contract, or that no payments will be made under any circumstances to his estate or other beneficiary, will not make the annuity contract forfeitable.

* * * * *

No. 13,097

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES A. CRISPIN and ALMA B. CRISPIN,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

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FILED

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PAUL P. O'BRIEN
CLERK

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ARGUMENT.

I. THE RECENT DECISION IN ELLIOTT C. MORSE

(Jan. 28, 1952), 17 T.C. NO. 150.

After our reply brief was in draft form, we received the advance sheets of the opinion of the Tax Court in *Elliott C. Morse*, 17 T.C. No. 150, CCH Dec. 18,759, promulgated January 28, 1952. Had this case been decided before appellee's brief was printed, doubtless some of the statements in that brief would never have been made. For example, of our contention that appellant's annuity contract was income in 1940, appellee made the following remarks: On page 13 of its brief, appellee calls that contention a "highly theo-

retical argument", and notes that "no reported case has ever gone so far and to our knowledge the Commissioner has never asserted such a position."

In the *Morse* case the Commissioner did assert the same position we assert, and the Tax Court upheld him. In due course the Department of Justice will doubtless be called on to argue in support of that decision, and hence of the same position it now calls "highly theoretical."

In the *Morse* case, a taxpayer's employer purchased a single premium annuity contract for him in 1941. The employer remained the owner of the contract until 1943, when the taxpayer retired and the employer assigned ownership of the contract to him. His rights were not assignable, there being a spendthrift clause. The Commissioner assessed an income tax against him for 1943, on the theory the employer's cost of the contract was income to the employee in the year he became owner of the contract. The Tax Court, in an opinion reviewed by the entire Court, upheld the Commissioner's determination.

The opinion of the Court states that under "the principles laid down in *Renton K. Brodie*, supra, and the cases which have followed it * * * petitioner was taxable in 1943 because of the transfer of the policy to him in that year." The Court saw no difficulty in the fact that the payment for the contract had been made in a prior year, since it was the accession to ownership, not the fact of payment, which was the taxable event.

There was an additional obstacle to approval of the Commissioner's determination in the *Morse* case, in that the accession to ownership occurred after the enactment of the 1942 amendments to Section 22(b)(2), Section 23(p), and Section 165. We are not faced with that obstacle in this case. The Court held Section 22(b)(2)(B) inapplicable, a result contrary to the assumption which is basic to appellee's argument that Section 22(b)(2)(B) has something to do with the instant case. Since we have disposed of this contention of appellee on other grounds, *infra*, we need not discuss in detail this additional point in the *Morse* case.

The dissents in the *Morse* case were signed by five of the sixteen judges of the Tax Court. The first dissent was to the Court's interpretation of the 1942 amendments, as well as to the view that a nonassignable contract can be income. The second dissent would overrule *Brodie*, 1 T.C. 275. Both dissents neglect to refer to the numerous Court of Appeals decisions which would have to be overruled if their views were to be adopted.

It is evident that this timely clarification of the Tax Court's views on our basic point strongly supports appellant's position.

II. THE STATUTE DOES NOT CONFINE COST TO THOSE CONTRIBUTIONS ON WHICH A TAX HAS BEEN PAID.

The essential thread of appellee's argument, visible time and again throughout the brief, is that the cost of an annuity contract is a permissible deduction from the annuity receipts only to the extent necessary to prevent double taxation. If this argument is not sound, appellee has offered nothing to support the judgment.

If a recoverable cost is recognized only to the extent necessary to avoid double taxation, why has appellant any recoverable cost at all? His own contributions to the cost were paid from his salary, and he was not taxable on his salary. Therefore, he could be taxed presently on the full amount of the annuity receipts without there being double taxation. Yet the parties are in agreement that the contributions appellant made to the cost are recognizable cost, deductible from the taxable receipts. See footnote p. 7 of appellee's brief, where this concession is made, though understandably not highlighted.

Again, if cost is to be recognized only to the extent necessary to avoid double taxation, why is a donee of an annuity contract allowed any cost to be recovered tax-free? A gift is not subject to income tax, and may not be subject even to a gift tax. A gift larger than the total cost of appellant's annuity contract can be made tax-free by a single person, and one twice as large by a married person. Therefore the possibility of the gift not having been taxed at all is

anything but remote. Yet it is recognized that the donee's cost basis of an annuity contract includes his donor's contributions. *MacArthur v. Commissioner* (1948, CA 8), 168 F. (2d) 413; *Title Guarantee & Trust Co.* (1939), 40 BTA 475, 482.

The truth is that avoidance of double taxation is not the universal touchstone under Section 22(b)(2) (A), any more than it is under the related basis provisions applicable to depreciation and gains and loss on sales and exchanges.¹ We are certain neither appellee nor any Court would have any doubt that if appellant's employer had paid him a block of stock on his retirement in 1940, the cost basis of that stock would be its value on the date of receipt by appellant. If appellant later sold the stock, he would be taxable only on the excess of the sale price over that basis, i.e., on the increment in his hands after he got it. Yet the effect would be to exempt forever, not merely to prevent double taxation on, the value when appellant received it free of tax. Compare *Brown Shoe Co. v. Commissioner* (1950), 339 U.S. 583, where the basis of depreciation of corporate property was held to include values contributed by non-shareholders and on the receipt of which no tax had been paid.

Appellee's construction of the statute puts the cart before the horse. It proceeds as if the terms of the statute expressly stated that the recoverable cost of the annuity contract was only the "contributions of

¹I.R.C. Secs. 111, 113. Appellee also considers the problems under these sections to be related to that herein. Appellee's Brief, p. 10.

the annuitant," and the Courts had grafted an exception on that language to prevent double taxation. The language of the statute, however, is not so limited. In terms, it allows the tax-free recovery of *all* contributions. To prevent unjustified exemption of income which Congress had given no evidence of a purpose to exempt, the Courts have read the purpose of the provision into the statute. The purpose was to allow the tax free recovery of what had become capital. It does not follow from this that all contributions except those from taxed income can be ignored. The recognition accorded the contributions from appellant's untaxed salary, the recognition accorded contributions by way of gift, the recognition that would doubtless be accorded contributions from inherited capital—all these serve to emphasize the point.

There is not, nor has there been, any Congressional purpose to tax appellant's earnings received while he was a nonresident. Instead, the declared purpose is the exact opposite. I.R.C. Sec. 116(a). If, then, the receipt of this annuity contract was income to appellant while he was a nonresident, Congress' purpose was to exempt it, not to tax it.

We believe we demonstrated in our opening brief that under established concepts appellant received income in 1940 when in that year he became unconditional owner of the annuity contract. Appellee has been pleased to call our argument a "highly theoretical" one, and has disputed it without explaining why. Yet, in view of the position successfully adopted by the

Commissioner of Internal Revenue in the *Morse* case, supra, it must be apparent that appellee's position in the instant case does not reflect a considered, consistent policy of the Bureau of Internal Revenue.

III. THE IMPLICATIONS OF THE WOLFE CASE SUPPORT APPELLANT RATHER THAN APPELLEE.

Appellee's brief (pp. 7-8, 11-12) cites *Wolfe v. Commissioner*, 8 T.C. 689, 700-701, aff'd per curiam (CA 9), 170 F. (2d) 73, cert. den. 336 U.S. 914, and speaks of it as a case which interpreted Section 22(b)(2)(A). We can understand appellee's anxiety to find a decision from this Court which supported its position, but we do not believe that that anxiety has produced such a case. As we pointed out in our opening brief (App. Op. Br. p. 14), the *Wolfe* case did not involve an annuity contract but an apparently revocable promise of the employer. The Tax Court decided the case on this ground and expressly rejected the contention that an annuity contract was involved, so as to require construction of Section 22(b)(2)(A).²

Appellee, however, insists there was an alternate ground of decision beneficial to its cause. This is demonstrably contrary to the fact, as consideration of all the paragraphs on the pages cited by appellee (8 T.C. pp. 700-701), instead of only two of them,

²Since this Court wrote no opinion in the case, we infer it considered the matter adequately dealt with in the opinion of the Tax Court. For this reason we refer at some length to the opinion of that Court.

will reveal. The first paragraph ending on those pages discusses the facts of that case and concludes as follows:

“We can not say, on all such evidence, that Anglo purchased an annuity from Standard.”

Thus the Court rejected the contention that the case involved an annuity contract.

The next paragraph is as follows:

“We conclude and hold that the moneys received by the petitioner in the taxable year were not ‘Amounts received as an annuity under an annuity * * * contract,’ within the language of that section. Nor is the contract made in 1940 otherwise shown to have been a contract taxable to the petitioner in 1940 (though not reported by him as Federal income or to Canada or England.)”

The first sentence of this paragraph is the statement of the legal conclusion which followed from the prior factual conclusion; namely, that Section 22(b)(2)(A) was not involved.

Presumably appellee reads the next sentence in the opinion as being an alternative ground of decision, but it is not: it is the commencement of the rejection of an additional argument advanced by the taxpayer. The opinion makes it quite evident that the taxpayer had argued an additional point, to the effect that even if the contract was not an annuity contract it was nevertheless a contract, and it had become income to him in 1940 while he was an exempt nonresident. This

argument was rejected, and had it not been rejected the taxpayer would have won regardless of the decision against him on the first issue.

The last three paragraphs of the opinion, not merely the first two of the last three, state the grounds for the rejection of this additional argument. It is quite evident the Tax Court did not take the simple course appellee says it did. It did not hold that a person who was an exempt nonresident when he acquired a pension contract would necessarily be taxable on its fruits when he received them because he had been exempt from tax when he received the contract. The Court could have said this easily had it intended to say it at all.

Instead the Court wrote three paragraphs showing that the particular contract by its very nature was not of a type to constitute income on its receipt. The first of these three paragraphs brings out the prior Tax Court authority for the proposition that the taxpayer's position depends on his ability to show that the contract he received in 1940 constituted "taxable income" to him in that year. The next paragraph constitutes a statement of that conclusion, concluding with these words (8 T.C. at 701):

"So, if the petitioner had not 'taxable income' in 1940 in the 'annuity' funds, he had nothing to recover tax-free later."

If that case were to support appellee, it is at this point that the opinion should have said that since taxpayer was an exempt nonresident when he re-

ceived the contract, he could not have had "taxable income" on its receipt. It said nothing like this, however. Instead it embarked on a discussion of whether the nature of the receipt brought it within the concept of "taxable income" which has been evolved in the cases.

Confining itself to a consideration of the most closely analogous cases, those involving annuity contracts, it said:

"In our opinion, this is not the class of contract taxable at value to the recipient. The contracts in (citations omitted; they are annuity contracts cases cited at pp. 12-13 of Appellants' Opening Brief), cited by the petitioner, and all cases found by us following them, were all ordinary commercial annuity contracts, purchased by employers from insurance companies for employees; therefore, the fact that they were held taxable to the recipients is no indication that an agreement here by Anglo and Standard to carry out their pension policy should be considered to have such value as to be taxable to the petitioner as recipient, and therefore offer reason to allow exemption from tax of amounts received in later years under the contract."

The clear implication of this language is that if the taxpayer had received a standard form annuity contract his case would have been different.³

Appellant herein did receive a standard form annuity contract, so his case is different from *Wolfe's*

³The recent *Morse* decision, *supra*, dispels any doubt which might exist that this is the intended implication of the quoted language.

case. If that *Wolfe* opinion had been from this Court instead of the Tax Court, the favorable implications of the foregoing language would have been strong authority for us, on which we would have relied. Since, however, that favorable implication might be deemed to be in the nature of dictum, we placed our case on the solid ground of principle. However, since appellee has chosen to lay great emphasis on the *Wolfe* case, we believe it is now proper for us to point out that the clear implication of the opinion is distinctly favorable to appellant.

IV. THE 1942 AMENDMENTS HAVE NO APPLICATION TO THIS CASE.

Appellee suggests (Br. 13-14, footnote) that the rule for which we contend is contrary to the 1942 amendments to Section 22(b)(2)(B). Notwithstanding appellee's unsupported denial, we take it to be entirely clear from the considerations set forth at page 5 of our opening brief that those amendments are without application to an annuity contract which had vested prior to 1942. This, however, does not appear to be appellee's real point. Its real point seems to be twofold: that the rule we argue for would be inequitable and impractical; and that the rule established by the 1942 amendments is merely declaratory of the old law.

The first point we need not challenge, since we do not concede the implication appellee would draw from

it. So far as inequity and impracticality are concerned, no distinction can be drawn between taxing a person on a single premium annuity and on an installment premium annuity. Neither one is cash, and in some of the decided cases the single premium annuity contracts were not even freely convertible into cash. Yet the inequity and impracticality of requiring an income tax to be paid in excess of the taxpayer's cash income for the year did not deter the Government from throwing single premium annuity contracts into income of the year of receipt, did not deter the Department of Justice from arguing to support such action, and did not deter the Courts from approving it. In *Hackett v. Commissioner* (1946, C.A. 1), 159 F. (2d) 121, referred to approvingly in appellee's brief no less than five times, the annuity cost taxed to one taxpayer in a single year was \$75,000. Does anyone suppose that taxpayer was any happier about the result, or had any more ease in paying the tax, than he would have had if the \$75,000 cost of the annuity contract had been paid by the employer in installments instead of one lump sum? Yet these considerations did not alter the result in the *Hackett* case, for as the Court there stated (159 F. (2d) at 123):

“* * * the receipt of the annuity contracts constituted an economic benefit conferred as additional compensation which is the equivalent of cash.”

Appellee's contention that our position is contrary to the 1942 amendments refers to the last sentence of Section 22(b)(2)(B). That sentence states a two-pronged

rule: *first*, it declares the circumstances in which an employee is taxable on his employer's contributions, in the case of a non-qualifying plan; *second*, it establishes a rule consistent with the first one for determining the tax-free cost of such an annuity. We do not see how it can be seriously suggested that the second prong of the rule can be applicable to annuities which had vested before the 1942 amendments were enacted, unless the first prong is also so applicable. Yet, as we have shown and appellee has conceded (Brief, footnote, p. 13), the amendments were all applicable to taxable years commencing after December 31, 1941. Therefore neither prong of the rule is directly applicable to this case.

Appellee then is driven to contend that the 1942 amendments were merely declaratory of existing law. Of course, it is obvious that as to most of the 1942 amendments to Section 22(b)(2)(B), Section 23(p), and Section 165, this is not true at all. In 1942 the sketchy and primitive treatment of employee's retirement plans was given a thorough goingover, and a new, complete and carefully integrated system was worked out. While some parts of the existing framework of law were utilized, this was done not because of any purpose to restate existing law but because certain fragments of it were good enough to retain in the new structure.

Hackett v. Commissioner (1946, C.A. 1), 159 F. (2d) 121, 125, in this connection is authority that the idea that the employer's contributions were part of

the allowable cost was not new in Section 22(b)(2)(B). We believe that is correct. The case recognizes expressly that the 1942 amendments were part of a careful scheme designed to improve on preexisting law. The whole point of the *Hackett* case, in this connection, is that the Court felt itself free to decide the case without any inferences drawn from the form of the 1942 amendments. We submit that this Court should feel equal freedom.⁴

No congressional purpose will be frustrated by appellant's position herein. Congress exempted him from tax on his earned income while he was a non-

⁴The legislative history is as follows: The House bill in 1942 contained a provision taxing the employee, in nonqualifying plans, on all his employer's contributions, both past and present, in the year his rights became nonforfeitable. The committee report (H. Rep. 2333, 77th Cong., 2d Sess., p. 105; same, 1942-2 C.B. at 451) discloses this much but not what the House thought the prior law was. The Senate changed the provision to its present form, the Finance Committee reporting as follows:

"The provision in the House bill to the effect that if the rights of the employee change from a forfeitable to a nonforfeitable right, under a plan which does not meet the requirements of section 162(a), the amount paid by the employer shall be included in income of the employee in the year in which the change occurs, has been stricken. Any amounts contributed by an employer for the benefit of an employee whose rights are forfeitable at the time of the contribution, will not be required to be included in the income of the employee until such amounts are actually received or made available to the employee." (S. Rep. 1631, 77th Cong., 2d Sess., p. 141; same, 1942-2 Cum. Bull. at p. 609.)

The conference report is silent on the point. H. Rep. 2586, 77th Cong., 2d Sess., pp. 52-53; same 1942-2 C.B. at pp. 713, 714.)

The Senate committee report has the sound of writing a new rule. If any relevant inferences can be drawn from it, they are that insofar as cases such as this one are concerned, the rules were changed in 1942. As we believe we have demonstrated, if the case is decided free of inferences drawn from the 1942 amendments, the result is the same.

resident.⁵ If the same care to define income broadly is used in applying the Congressional purpose to exempt income of nonresidents as in applying the Congressional purpose to tax income of residents, there can be but one result here. The judgment will be reversed.

CONCLUSION.

The judgment should be reversed.

Dated, San Francisco, California,

February 8, 1952.

Respectfully submitted,

ARTHUR H. KENT,

VALENTINE BROOKES,

Attorneys for Appellants.

⁵Appellee's reliance on estoppel cases, such as *Johnson v. Commissioner* (C.A. 5), 162 F. (2d) 844; *Commissioner v. Farren* (C.A. 10), 82 F. (2d) 141, and *Larkin v. U.S.* (C.A. 8), 78 F. (2d) 951, is a measure of desperation. Appellant is not estopped by having enjoyed an expressly conferred exemption.

No. 13100

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ADDISON N. HIMES and ROSS A. HIMES,
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CARTON COMPANY,
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Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 358)

Appeal from the United States District Court for the
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Attorneys for Appellants.

FORD E. SMITH,
734 Central Building,
Seattle 4, Washington;

C. M. McCUNE,
4516 University Way,
Seattle 5, Washington,

Attorneys for Appellee.

II.

That plaintiffs are informed and believe and on information and belief allege that the defendant V. B. Chadwick is a resident of Seattle, County of King, State of Washington, and has a regular and established place of business at Seattle, Washington, within the jurisdiction of this Court.

III.

That this Court has jurisdiction of this cause because the same arises under the patent laws of the United States.

IV.

That prior to May 22, 1933, Robert D. Parks and Glenn Hildenbrand were the inventors of Folding Carton, and being entitled under the law to a patent upon their said invention, did, on the 22nd day of May, 1933, make application for Letters Patent therefor, and pursuant to said application, Letters Patent of the United States No. 2,011,232 were duly, lawfully and regularly issued upon said application of the said Robert D. Parks and Glenn Hildenbrand.

V.

That plaintiffs herein, prior to the filing of this amended complaint, became the owners by assignments of all of the entire right, title and interest in and to and under said Letters Patent No. 2,011,232 with the right to sue for past infringement thereof.

VI.

That prior to February 24, 1939, Ross A. Himes was the inventor of Paper Box and Method of Making the Same, and, being entitled under the law to a patent upon his said invention, did on the 24th day of February, 1939, make application for Letters Patent therefor, and pursuant to said application Letters Patent of the United States No. 2,243,421 were duly, lawfully and regularly issued upon said application of the said Ross A. Himes.

VII.

That plaintiff herein, prior to the filing of this amended complaint, became the owners by assignment of all of the entire right, title and interest in, to and under said Letters Patent No. 2,243,421 with the right to sue for past infringement thereof.

VIII.

That plaintiffs are informed and believe and on information and belief allege that the defendant V. B. Chadwick has, within six years last past and prior to the filing of this complaint, and within the Western District of Washington, Northern Division, infringed said Letters Patents Nos. 2,011,232 and 2,243,421.

IX.

Plaintiffs are informed and believe and on information and belief allege that defendant has committed the aforesaid acts of infringement in know-

ing, wanton and deliberate disregard of the rights of plaintiffs in the premises.

X.

That plaintiffs have been damaged by the infringing acts of defendant in an amount unknown to plaintiffs, but plaintiffs are informed and believe and on information and belief allege that said damage is in excess of Twenty-five Thousand Dollars (\$25,000.00).

Wherefore Plaintiffs Pray:

1. For damages from the defendant for the infringement of said Letters Patents Nos. 2,011,232 and 2,243,421 in the amount of three per cent (3%) of the net sales price of cartons manufactured by the defendants.

2. That plaintiffs have judgment against the defendant for reasonable attorneys' fees incurred by plaintiffs in this action.

3. That plaintiffs have judgment against the defendant for their costs and disbursements herein.

ADDISON N. HIMES,
ROSS A. HIMES.

By /s/ JACK C. HURSH,
One of Counsel for
Plaintiffs.

ARNOLD and MATHIS,
/s/ CLINTON L. MATHIS.

[Endorsed]: Filed February 9, 1949.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

To V. B. Chadwick and Coast Carton Company, and
to McCune & Yothers, their attorneys:

You and each of you are hereby notified that
trial by jury in the above entitled cause is demanded
by the above-named plaintiffs.

MELLIN & HANSCOM,
ARNOLD & MATHIS,
By /s/ JACK C. HURSH,
/s/ CLINTON L. MATHIS.

[Endorsed]: Filed February 9, 1949.

[Title of District Court and Cause.]

MORE DEFINITE STATEMENT

Come now plaintiffs in the above-entitled action
and answer defendant's motion for more definite
statement as follows:

(a) As presently advised, plaintiffs will rely
upon all of the claims of Patent Number
2,011,232 as having been infringed by defendant.

(b) As presently advised, plaintiffs will rely
upon all of the claims of Patent Number
2,243,421 as having been infringed by defend-
ant.

(c) The particular carton manufactured and

sold by defendant which plaintiffs deem an infringement of the claims relied upon as having been infringed by defendant are the cartons having a bottom construction similar to that in a carton manufactured and sold by defendant to Nalley's, Inc., of Spokane and Tacoma, Washington, for potato chips.

The carton in possession of plaintiffs which is an infringement of the claims of said above-identified patents is one having the following legends on the front and back panels:

Nalley's
Fresh Potato Chips
Potatoes, Edible Vegetable Oil and Salt
Two Pounds Net Weight
Distributed by Nalley's, Inc., Spokane,
Tacoma, Washington

If It's
Nalley's
It's Good

and having the following legend on the side panels:

From
Nalley
Valley
Where Good Flavors Grow

and having the following legend on the top panel:

Also use:

Lumberjack Syrup,
Nalley's Mayonnaise,
Nalley's Dill Pickles,

Nalley's Hamburger Relish,
Nalley's Mustard,
Nalley's Sweet Relish,
Tang.

Said carton is of a size of 9 $\frac{1}{4}$ "x 11"x 6 $\frac{1}{4}$ ".

ADDISON N. HIMES,
ROSS A. HIMES.
MELLIN & HANSCOM,
ARNOLD & MATHIS,
By /s/ CLINTON L. MATHIS,
Attorneys for Plaintiffs.

Copy received.

[Endorsed]: Filed July 29, 1949.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Answer

Comes Now the defendant and answers the Amended Complaint as follows:

One

Answering Paragraphs I, II, and III of the Amended Complaint, defendant admits the allegations contained therein.

Two

Answering Paragraphs IV and VI of the Amended Complaint, defendant admits that said applications for Letters Patent were made on said

dates and that pursuant to said applications, Letters Patent were issued to said parties, but denies the remaining allegations of said paragraphs.

Three

Answering Paragraphs V and VII of the Amended Complaint defendant alleges that he is without knowledge or information sufficient to form a belief as to the facts alleged therein, and therefore denies all of the allegations of said paragraphs.

Four

Answering Paragraphs VIII, IX, and X of the Amended Complaint, defendant denies each and every allegation contained therein.

Five

The defendant further answering the Amended Complaint, pleads the following special defenses:

A. Upon information and belief, that the device charged to infringe either or both of the patents in suit is constructed of old elements combined in old aggregations, and is not subject to exclusive appropriation and may be manufactured and sold by anyone.

B. That each of the said United States Letters Patent in suit is invalid for want of invention.

C. That each of the said United States Letters Patent is invalid because each and all of the claims thereof include mere aggregations of old elements.

D. That said United States Letters Patent No. 2,011,232 are invalid because the alleged invention

disclosed and claimed therein was known and/or used by others before the alleged invention thereof, and/or was patented or described in a printed publication in this or in foreign countries before the alleged invention thereof and/or more than two years prior to the application therefor and/or was in public use and/or sale in this country more than two years prior to the application therefor, and particulars of said prior knowledge, use, patenting, publication, public use, and/or sale being as follows:

United States Letters Patent to:

		Dated
Arthur	No. 205,603	7/ 2/1878
Colburn	No. 283,209	8/14/1883
Tatum	No. 291,805	1/ 8/1884
Lindemeyer	No. 466,792	1/12/1892
Knobeloch	No. 616,473	12/27/1898
Wagnitz	No. 683,532	10/ 1/1901
Seegmiller	No. 772,381	10/18/1904
Medley	No. 797,446	8/15/1905
Rutledge	No. 805,234	11/21/1905
Brown	No. 875,409	12/21/1907
Morris	No. 1,362,129	12/14/1920
Laubersheimer	No. 1,509,735	9/23/1924
Berkowitz	No. 1,523,246	1/13/1925
Morris	No. 1,654,140	12/27/1927
Cramer	No. 1,662,698	3/13/1928
Creasey	No. 1,679,710	8/ 7/1928
Berkowitz	No. 1,700,733	2/ 5/1929
Filmer	No. 1,885,045	4/19/1932
Neumann	No. 2,017,724	10/15/1935

British Patents to:

		Accepted
Thornton	No. 24,581	10/24/1896
Filmer	No. 345,682	4/ 2/1931

French Patent to:

		Published
Leblanc	No. 425,017	5/31/1911
and others whose names, numbers and dates, defendant prays leave to hereafter add by amendment, or otherwise, when the same shall have been fully determined or ascertained.		

E. That said United States Letters Patent No. 2,243,421 are invalid because the alleged invention disclosed and claimed therein was known and/or used by others before the alleged invention thereof, and/or was patented or described in a printed publication in this or in foreign countries before the alleged invention thereof and/or more than two years prior to the application therefor and/or was in public use and/or on sale in this country more than two years prior to the application therefor, and particulars of such prior knowledge, use, patenting, publication, public use, and/or sale being as follows:

United States Letters Patent to:

		Dated
Knobeloch	No. 616,473	12/27/1898
Wagnitz	No. 683,532	10/ 1/1901
Seegmiller	No. 772,381	10/18/1904
Rutledge	No. 805,234	11/21/1905
Laubersheimer	No. 1,509,735	9/23/1924

Berkowitz	No. 1,523,246	1/13/1925
Cramer	No. 1,662,698	3/13/1928
Parks	No. 2,011,232	8/13/1935
Neumann	No. 2,017,724	10/15/1935
Weiss	No. 2,066,753	1/ 5/1937

British Patent to:

		Accepted
Filmer	No. 345,682	4/ 2/1931

French Patent to:

		Published
Leblanc	No. 425,017	5/31/1911

and others whose names, numbers and dates, defendant prays leave to hereafter add by amendment, or otherwise, when the same shall have been fully determined or ascertained.

F. That each of the aforesaid Letters Patent were issued by the United States Patent Office without due investigation and that an important part of the relevant prior art hereinbefore set forth was overlooked and other parts of said prior art were improperly applied and construed; wherefore the Commissioner of Patents exceeded his legal authority in granting the aforesaid Letters Patent and each of the said patents is, therefore, void and of no effect.

G. That the alleged inventions claimed in the aforesaid patents are different in substantial degree from any indicated, suggested, or described in the original applications therefor.

H. That the alleged inventions and each claim

thereof are not the joint inventions of the parties claiming joint inventorship in said inventions, but the alleged inventions and claims or parts thereof are the sole inventions of one of aforesaid parties.

I. That plaintiffs have failed to give defendant proper notice of alleged infringement and have failed to mark the boxes made, used or sold by the plaintiffs or their licensees under said Letters Patent as required by the provisions of 35 U.S.C. Sec. 49; R.S. 4900.

J. That said Letters Patent and each of them are invalid because the description, specification and claims thereof are ambiguous, indefinite and uncertain and fail to comply with the provisions of 35 U.S.C. Sec. 33; R.S. 4888.

K. That plaintiffs are estopped to assert any cause of action against the defendant or to maintain this suit by reason of the fact that they come into this Court with unclean hands.

L. That the defendant has at no time or place made use of the alleged inventions claimed in each of the Letters Patent in suit, that it has never practiced any process or made, used or sold any containers in infringement of any rights of the plaintiffs thereunder, or damaged the plaintiffs in respect of any of said Letters Patent or profited by reason of anything contained in or covered by each of said Letters Patent.

Six

The defendant further answering the Amended Complaint, pleads the additional special defense that:

A. Defendant, since long prior to the institution of this action, has been and is the exclusive licensee in the States of Idaho, Oregon, Washington, Utah and the territories of Alaska, Hawaii and the Philippine Islands, to make and sell cartons under United States Letters Patent No. 2,388,190 issued October 30, 1945, to R. F. Smart for a "Foldable Cardboard Box."

B. Defendant manufactured and sold the carton identified by the plaintiffs in Paragraph (C) of its More Definite Statement in this action under his license to make and sell cartons under said United States Letters Patent No. 2,388,190, and such carton when sold bore the statutory patent notice as required by 35 U.S.C. sec. 49; R.S. 4900.

Counterclaim

The defendant complains of the plaintiffs, and, as his claim for relief, alleges that:

Seven

Defendant-counterclaimant is a citizen of the United States and a resident of Seattle, County of King, State of Washington, and is doing business under the firm name and style of Coast Carton Company.

Eight

Plaintiffs-counterdefendants Addison N. Himes and Ross A. Himes are citizens of the United States and residents of Walnut Creek, County of Contra Costa, State of California, and Arcadia, County of Los Angeles, State of California, respectively, and

are doing business under the firm name and style of Nolox Company of America.

Nine

This Court has jurisdiction of the Counterclaim because the same arises under the patent laws of the United States because it is an action for declaratory judgment arising under Title 28 United States Code, Judiciary and Judicial Procedure Sec. 2201 (as amended by Act of May 24, 1949) and arises from an actual controversy between the parties.

Ten

Plaintiffs-counterdefendants by virtue of having filed the Complaint herein have charged the defendant-counterclaimant with acts constituting infringement of United States Letters Patent Nos. 2,011,232 and 2,243,421.

Eleven

The defendant-counterclaimant further alleges:

A. Upon information and belief, that the device charged to infringe either or both of the patents in suit is constructed of old elements combined in old aggregations, and is not subject to exclusive appropriation and may be manufactured and sold by anyone.

B. That each of the said United States Letters Patent in suit is invalid for want of invention.

C. That each of the said United States Letters Patent is invalid because each and all of the claims thereof include mere aggregations of old elements.

D. That said United States Letters Patent No.

2,011,232 are invalid because the alleged invention disclosed and claimed therein was known and/or used by others before the alleged invention thereof, and/or was patented or described in a printed publication in this or in foreign countries before the alleged invention thereof and/or more than two years prior to the application therefor and/or was in public use and/or sale in this country more than two years prior to the application therefor, and particulars of said prior knowledge, use, patenting, publication, public use, and/or sale being as follows:

United States Letters Patent to:

		Dated
Arthur	No. 205,603	7/ 2/1878
Colburn	No. 283,209	8/14/1883
Tatum	No. 291,805	1/ 8/1884
Lindemeyer	No. 466,792	1/12/1892
Knobeloch	No. 616,473	12/27/1898
Wagnitz	No. 683,532	10/ 1/1901
Seegmiller	No. 772,381	10/18/1904
Medley	No. 797,446	8/15/1905
Rutledge	No. 805,234	11/21/1905
Brown	No. 875,409	12/21/1907
Morris	No. 1,362,129	12/14/1920
Laubersheimer	No. 1,509,735	9/23/1924
Berkowitz	No. 1,523,246	1/13/1925
Morris	No. 1,654,140	12/27/1927
Cramer	No. 1,662,698	3/13/1928
Creasey	No. 1,679,710	8/ 7/1928
Berkowitz	No. 1,700,733	2/ 5/1929
Filmer	No. 1,885,045	4/19/1932
Neumann	No. 2,017,724	10/15/1935

British Patents to:

		Accepted
Thornton	No. 24,581	10/24/1896
Filmer	No. 345,682	4/ 2/1931

French Patent to:

		Published
Leblanc	No. 425,017	5/31/1911

and others whose names, numbers and dates, defendant-counterclaimant prays leave to hereafter add by amendment, or otherwise, when the same shall have been fully determined or ascertained.

E. That said United States Letters Patent No. 2,243,421 are invalid because the alleged invention disclosed and claimed therein was known and/or used by others before the alleged invention thereof, and/or was patented or described in a printed publication in this or in foreign countries before the alleged invention thereof and/or more than two years prior to the application therefor and/or was in public use and/or on sale in this country more than two years prior to the application therefor, and particulars of such prior knowledge, use, patenting, publication, public use, and/or sale being as follows:

United States Letters Patent to:

		Dated
Knobeloch	No. 616,473	12/27/1898
Wagnitz	No. 683,532	10/ 1/1901
Seegmiller	No. 772,381	10/18/1904
Rutledge	No. 805,234	11/21/1905

Laubersheimer	No. 1,509,735	9/23/1924
Berkowitz	No. 1,523,246	1/13/1925
Cramer	No. 1,662,698	3/13/1928
Parks	No. 2,011,232	8/13/1935
Neumann	No. 2,017,724	10/15/1935
Weiss	No. 2,066,753	1/ 5/1937

British Patent to:

		Accepted
Filmer	No. 345,682	4/ 2/1931

French Patent to:

		Published
Leblanc	No. 425,017	5/31/1911

and others whose names, numbers and dates, defendant-counterclaimant prays leave to hereafter add by amendment, or otherwise, when the same shall have been fully determined or ascertained.

F. That each of the aforesaid Letters Patent were issued by the United States Patent Office without due investigation and that an important part of the relevant prior art hereinbefore set forth was overlooked and other parts of said prior art were improperly applied and construed; wherefore the Commissioner of Patents exceeded his legal authority in granting the aforesaid Letters Patent and each of the said patents is, therefore, void and of no effect.

G. That the alleged inventions claimed in the aforesaid patents are different in substantial degree from any indicated, suggested, or described in the original applications therefor.

H. That the alleged inventions and each claim therefor are not the joint inventions of the parties claiming joint inventorship in said inventions, but the alleged inventions and claims or parts thereof are the sole inventions of one of aforesaid parties.

I. That plaintiff-counterdefendant have failed to give defendant-counterclaimant proper notice of alleged infringement and have failed to mark the boxes made, used or sold by the plaintiff-counterdefendants or their licensees under said Letters Patent as required by the provisions of 35 U.S.C., Sec. 49; R.S. 4900.

J. That said Letters Patent and each of them are invalid because the description, specification and claims thereof are ambiguous, indefinite and uncertain and fail to comply with the provisions of 35 U.S.C., Sec. 33; R.S. 4888.

K. That plaintiff-counterdefendants are estopped to assert any cause of action against the defendant-counterclaimant or to maintain this suit by reason of the fact that they come into this Court with unclean hands.

L. That the defendant-counterclaimant has at no time or place made use of the alleged inventions claimed in each of the Letters Patent in suit, that it has never practiced any process or made, used or sold any containers in infringement of any rights of the plaintiff-counterdefendants thereunder, or damaged the plaintiff-counterdefendants in respect of any of said Letters Patent or profited by reason

of anything contained in or covered by each of said Letters Patent.

Twelve

The defendant-counterclaimant further alleges that:

A. Defendant-counterclaimant, since long prior to the institution of this action, has been and is the exclusive licensee in the States of Idaho, Oregon, Washington, and Utah, and the territories of Alaska, Hawaii and the Philippine Islands to make and sell cartons under United States Letters Patent No. 2,388,190 issued October 30, 1945, to R. F. Smart for a "Foldable Cardboard Box."

B. Defendant-counterclaimant manufactured and sold the carton identified by the plaintiff-counterdefendants in Paragraph (C) of its More Definite Statement in this action under his license to make and sell cartons under said United States Letters Patent No. 2,388,190, and such carton when sold bore the statutory patent notice as required by 35 U.S.C, Sec. 49; R.S. 4900.

Wherefore, the Defendant-Counterclaimant Prays:

One

That the Complaint be dismissed.

Two

For a decree declaring that:

a. United States Letters Patent in suit Nos. 2,011,232 and 2,243,421 are invalid; and

b. Defendant-counterclaimant has committed no act or acts of infringement of any United

States Letters Patent owned by the plaintiff-counterdefendant.

Three

That an injunction issue out of and under the Seal of this Court directed to the plaintiffs-counterdefendants, their associates, partners, attorneys, clerks, servants, agents, employees and confederates and all in privity with them and each of them, perpetually enjoining them and each of them from instituting or proceeding with, in this or in any other Court, any suits or actions against this defendant-counterclaimant, or those holding under it, its successors or assigns and its customers for infringement of either of said United States Letters Patent Nos. 2,011,232 and 2,243,421.

Four

Defendant-counterclaimant be awarded reasonable attorneys fees in this action together with his costs.

/s/ FORD E. SMITH,

Attorney for Defendant-
Counterclaimant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 12, 1949.

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Come now plaintiffs-counterdefendants, and for their answer to the counterclaim herein filed admit, deny and allege as follows:

1. Answering Paragraph Seven, plaintiffs-coun-

ter-defendants admit the allegations therein contained.

2. Answering Paragraph Eight, plaintiffs-counter-defendants admit the allegations therein contained.

3. Answering Paragraph Nine, plaintiffs-counter-defendants admit that there is an actual controversy between the parties; except for said admission, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations in said paragraph contained.

4. Answering Paragraph Ten, plaintiffs-counter-defendants admit the allegations therein contained.

5. Answering Paragraph Eleven, plaintiffs-counter-defendants deny each and every, all and singular, the allegations therein contained.

6. Answering Paragraph Twelve (A), plaintiffs-counter-defendants deny the allegations therein contained.

Answering Paragraph Twelve (B), plaintiffs-counter-defendants admit that defendant-counter-claimant manufactured and sold the carton identified by the plaintiffs-counter-defendants in Paragraph (C) of its More Definite Statement; except for said admission, plaintiffs-counter-defendants deny each and every, all and singular, the allegations in said paragraph contained.

7. Further answering said counterclaim, plaintiffs-counter-defendants allege that defendant-coun-

terclaimant has within six (6) years last past and within the Western District of Washington, Northern Division, infringed said Letters Patent Nos. 2,011,232 and 2,243,421.

8. Further answering said counterclaim, plaintiffs-counter-defendants allege that on information and belief defendant-counterclaimant committed his acts of infringement in knowing, wanton and deliberate disregard of the rights of plaintiffs-counter-defendants.

Wherefore, plaintiffs-counter-defendants pray:

1. That defendant-counterclaimant take nothing by its counterclaim and that the same be dismissed.

2. That plaintiffs-counter-defendants have judgment against defendant-counterclaimant for reasonable attorneys' fees incurred by plaintiffs-counter-defendants.

3. That plaintiffs-counter-defendants have judgment against defendant-counterclaimant for their costs and disbursements and such other and further relief as this Court may deem meet and proper in the premises.

ADDISON N. HIMES,

ROSS A. HIMES,

ARNOLD & MATHIS,

By /s/ CLINTON L. MATHIS,

Attorneys for Plaintiffs-
Counter-Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 23, 1949.

[Title of District Court and Cause.]

LIMITATION OF ISSUES RAISED BY
AMENDED COMPLAINT, ANSWER TO
AMENDED COMPLAINT, COUNTER-
CLAIM, AND ANSWER TO COUNTER-
CLAIM

It is hereby stipulated by and between the parties hereto through their respective counsel of record as follows:

I.

That all claims of Parks patent No. 2,011,232 in suit, except claims numbered 2 and 5, are withdrawn from issue.

II.

(A) That the issues as to the Parks patent No. 2,011,232 are limited to the validity of claims 2 and 5 or either thereof.

(B) If either or both of said claims is found to be valid, the defendant shall be adjudged to have infringed such valid claim or claims by his acts of manufacturing and selling boxes complained of in the amended complaint and exemplified by the box attached as an exhibit to defendant's interrogatories on file herein and now marked Exhibit 3 to the Himes' deposition.

III.

That all claims of Himes patent 2,243,421 are withdrawn from issue, except claim number 1.

IV.

That the issues as to the Himes patent are limited to:

- (a) Is claim 1 of Himes patent valid or invalid?
- (b) If claim 1 of Himes patent is valid, is it infringed by acts of the defendant or not infringed thereby?

V.

That plaintiffs became, on Feb. 1, 1946, owners of an undivided 4/5ths of the Parks patent in suit, and on July 26, 1948, became the owners of all the right, title, and interest in and to Parks patent No. 2,011,232 and at the time of the filing of the complaint herein and now are the owners of all of the right, title, and interest in the Parks patent No. 2,011,232. Defendants having been assured by plaintiffs' counsel that plaintiff has good title, defendant admits the foregoing.

VI.

That plaintiffs at all times since the issuance thereof, and now, are the owners of all of the right, title, and interest in and to Himes patent No. 2,243,421.

VII.

That on August 9, 1948, plaintiffs in writing notified defendant of infringement of Parks patent No. 2,011,232 and that no written notice was given to defendant as to any charge of infringement of Himes patent 2,243,421, except by serving on defendant the amended complaint herein which was on or about January 5, 1949.

VIII.

That the charge in the complaint that defendant

committed any acts alleged as infringement in knowing, wanton and deliberate disregard of plaintiffs' rights of the two patents in suit is withdrawn.

IX.

That the damages to be awarded to plaintiff for infringement of the Parks patent in suit, if either claims 2 or 5 thereof, or both of said claims, be found to be valid, shall be Fifteen Hundred (\$1,500.00) Dollars.

X.

That in the event claim 1 of Himes patent 2,243,421 shall be found both valid and infringed, the damages to be awarded plaintiff for such infringement of the Himes patent shall be in the nominal amount of One Hundred (\$100.00) Dollars.

XI.

That the prior art patents to be relied upon by the defendant at the trial to show invalidity of claims 2 and 5 of the Parks patent and claim 1 of the Himes patent shall be the following:

Cramer—1,662,698, Mar. 13, 1928; 229-41B, 230.

Filmer (Br.)—345,682, Apr. 2, 1931; 229-41-1, sh. dwg., and 3 sh. spec.

Creasey—1,679,710, Aug. 7, 1928; 229-41A, 251.

Berkowitz—1,700,733, Feb. 5, 1929; 229-39, 99.

Leblanc (Fr.)—425,017, May 31, 1911.

Morris—1,362,129, Dec. 14, 1920.

Neumann—2,017,724, Oct. 15, 1935; 229-41.

Rutledge—805,234, Nov. 21, 1905.

XII.

That plaintiff admits that the Court has jurisdiction of the Counterclaim.

XIII.

That the defenses and issues raised by the defendant, as hereinafter identified, are withdrawn by the defendant:

Answer—Paragraph five, subsections G, H, I, and K; paragraph six, subsections A and B; and

Counterclaim—Paragraph eleven, subsections G, H, I and K, and paragraph twelve, subsections A and B.

Dated at Seattle, Washington, this 30th day of January, 1951.

ADDISON N. HIMES,
ROSS A. HIMES.

ARNOLD & MATHIS,
/s/ CLINTON L. MATHIS,
Their Attorneys.

V. B. CHADWICK,
/s/ FORD C. SMITH,
His Attorney.

[Endorsed]: Filed January 31, 1951.

[Title of District Court and Cause.]

SPECIAL VERDICTS

We, the Jury in the Above-Entitled Cause, Find:

I.

Claim 2 of Parks Pat. 2,011,232 is valid.

II.

Claim 5 of Parks Pat. 2,011,232 is valid.

III.

Claim 1 of Himes Pat. 2,243,421 is infringed.

IV.

Claim 1 of Himes Pat. 2,243,421 is valid.

/s/ HENRY J. YOUNG,
Foreman.

[Endorsed]: Filed February 5, 1951.

[Title of District Court and Cause.]

MOTIONS UNDER RULE 50 AND
MOTION TO DISMISS

Motions Under Rule 50

Defendant renews his motion for directed verdict made at the close of all the evidence and moves for judgment notwithstanding the verdict, that Claims 2 and 5 of the Parks U. S. Patent No. 2,011,232 are invalid; that Claim 1 of the Himes U. S. Patent No. 2,243,421 is invalid; and that Claim 1 of the

Himes U. S. Patent No. 2,243,421 is not infringed.

In the alternative, Defendant moves for a new trial.

The grounds of these motions are as follows:

1. Defendant alleges error in the findings of the jury for the reason that the evidence presented at the trial of this case was clear, cogent and convincing that Parks Claims 2 and 5 and Himes Claim 1 are invalid and that Himes Claim 1 was not infringed. Defendant alleges error in the findings of the jury for the reason that the evidence presented at the trial of this case was clear, cogent and convincing that Parks Claims 2 and 5 and Himes Claim 1 are invalid for want of invention and that they are anticipated by prior patents, prior disclosures in patents, and prior public use in the United States. Defendant alleges error in the findings of the jury for the reason that the evidence presented at the trial of this case was insufficient to justify a verdict of infringement of Himes Claim 1.

2. Defendant alleges error in the findings of the jury for the reason that Instruction 13, to which proper exception was taken, incorrectly stated the law as to anticipation and misled the jury, causing them to improperly find for the Plaintiffs in regard to the validity of Parks Claims 2 and 5 and Himes Claim 1.

3. Defendant alleges error in the finding of the jury as to the question of infringement of Himes Claim 1 because of the exclusion from the jury of

testimony concerning Claim 2 of said Himes Patent. Himes Claim 2 concerns a similar method of folding cartons to that recited in Himes Claim 1, and has been disclaimed; and the jury could not properly interpret Claim 1 and determine its proper coverage without knowledge of the disclaimed subject matter of Claim 2; and the jury was thus led to error concerning the question of infringement of Himes Claim 1.

Motion to Dismiss

Defendant renews his motion made at the trial of this case and moves that the Himes Patent No. 2,243,421, and the claims thereof, be dismissed from the case. Defendant bases this motion on the grounds that during the trial of the case Plaintiff Ross A. Himes, the patentee in said Himes patent, gave testimony clearly showing that he knew that the subject matter of Himes Claim 3 was old and unpatentable, that he knew that Claim 3 was invalid, and that he had unreasonably delayed in making a disclaimer of Claim 3.

Most respectfully submitted,

/s/ DUANE C. BOWEN,

Counsel for Defendant.

Service admitted.

[Endorsed]: Filed February 15, 1951.

[Title of District Court and Cause.]

ORDER

Defendant's motion for judgment in his favor notwithstanding the verdict of the jury is granted. Counsel for defendant will prepare, serve and submit draft of order and judgment.

Dated May 28th, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

Notice of Mailing attached.

[Endorsed]: Filed May 28, 1951.

In the United States District Court, Western
District of Washington, Northern Division

Civil Action No. 2092

ADDISON N. HIMES and ROSS A. HIMES,
Individuals, Doing Business Under the Firm
Name and Style of NOLOX COMPANY OF
AMERICA,

Plaintiffs,

vs.

V. B. CHADWICK, an Individual, Doing Business
Under the Firm Name and Style of COAST
CARTON COMPANY,

Defendant.

FINAL DECREE

This Cause having come on for trial before a jury; and the cause having been tried and evidence

adduced by the Plaintiffs and the Defendant on the issues herein; and the Defendant having duly and regularly moved for a directed verdict at the close of all the evidence and said motion having not been granted, the Court reserving its ruling; and the jury having returned special verdicts on the issues in favor of Plaintiffs; and Defendant having duly and regularly moved to have said verdicts and any judgment entered thereon set aside and for judgment in his favor in accordance with his motion for a directed verdict; and the Court, having considered the written arguments of the parties relative the merits of said motion, concluding as a matter of law in view of the evidence that the claims in issue are invalid and that the claim in issue as to infringement is not infringed; and the Court having granted Defendant's motion for judgment in his favor notwithstanding the verdicts; it is

Ordered, Adjudged and Decreed by the Court as follows:

1. That Claims 2 and 5 of the Parks and Hildenbrand U. S. Patent No. 2,011,232 are invalid.

2. That Claim 1 of the Himes U. S. Patent No. 2,243,421 is invalid.

3. That Claim 1 of the Himes U. S. Patent No. 2,243,421 is not infringed.

4. That the clerk's entry of Judgment on Special Verdicts, made on February 6, 1951, in the Civil Docket be hereby nullified.

5. That an injunction issue out of and under the seal of this Court directed to the Plaintiffs,

their associates, partners, attorneys, clerks, servants, agents, employees and confederates and all in privity with them and each of them, perpetually enjoining them and each of them from instituting or proceeding with, in this or in any other Court, any suits or actions against this Defendant or those holding under him, his successors or assigns and his customers for infringement of either of said United States Letters Patent No. 2,011,232 and No. 2,243,421.

6. That Plaintiffs pay to the Defendant his costs in this suit to be taxed.

Entered this 7th day of June, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

Submitted by:

/s/ FORD E. SMITH,

FORD E. SMITH, and

C. M. McCUNE,

Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered June 8, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiffs Addison N. Himes and Ross A. Himes, above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order granting defend-

ant's Motion for Judgment Notwithstanding Verdict, dated May 28, 1951, entered in this action on or about May 28, 1951, and the Judgment dated June 7, 1951, entered in this action on or about June 8, 1951.

Dated June 27, 1951.

MELLIN, HANSCOM &
HURSH,

By /s/ JACK E. HURSH,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 27, 1951

[Title of District Court and Cause.]

CONCISE STATEMENT OF THE POINTS ON
WHICH PLAINTIFFS-APPELLANTS IN-
TEND TO RELY ON APPEAL

Come Now plaintiffs-appellants Addison N. Himes and Ross A. Himes, individuals, doing business under the firm name and style of NoloX Company of America, and make the following concise statement of the points upon which they intend to rely for appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment made and entered June 7, 1951, in the above-entitled cause:

1. The court erred in setting aside the verdict of the jury.

2. The court erred in not denying defendant's motion for judgment notwithstanding the verdict

on the ground that there was substantial evidence to support the verdict of the jury.

3. The court erred in setting aside the verdict of the jury because in so doing, plaintiffs-appellants were denied a trial by jury.

4. The court erred in signing and entering the final judgment of June 7, 1951, in that said judgment of June 7, 1951, is against the substantial weight of the evidence.

5. The court erred in holding claims 2 and 5 of United States Letters Patent No. 2,011,232 invalid.

6. The court erred in holding claim 1 of United States Letters Patent No. 2,243,421 invalid.

7. The court erred in holding claim 1 of United States Letters Patent No. 2,243,421 was not infringed.

Dated July 5, 1951.

ARNOLD & MATHIS,
MELLIN & HANSCOM,
By /s/ JACK E. HURSH,
Attorneys for
Plaintiffs-Appellants.

I hereby certify that a copy of the foregoing Concise Statement of the Points on Which Plaintiffs-Appellants Intend to Rely on Appeal has this day been mailed to Ford E. Smith, 734 Central Building, Seattle 4, Washington, and C. M. McCune, 4516 University Way, Seattle 5, Washington, attorneys for defendant-appellee.

/s/ JACK E. HURSH.

July 5, 1951.

[Endorsed]: Filed July 6, 1951.

[Title of District Court and Cause.]

ORDER

Good Cause Appearing Therefor, It Is Hereby Ordered that the time for filing plaintiffs-appellants' transcript of record on appeal in the above-entitled cause is hereby extended to September 20, 1951.

Dated July 24, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

Receipt of Mailing attached.

[Endorsed]: Filed July 24, 1951.

In the District Court of the United States for the
Western District of Washington, Northern
Division

Civil Action No. 2092

ADDISON N. HIMES, and ROSS A. HIMES,
Individuals, Doing Business Under the Firm
Name and Style of Nolo Company of America,
Plaintiffs,

vs.

V. B. CHADWICK, an Individual, Doing Business Under the Firm Name and Style of
COAST CARTON COMPANY,
Defendant.

Before: The Honorable Dal M. Lemmon,
U. S. District Judge, and a jury.

Appearances:

JACK E. HURSH, ESQ., and

OSCAR A. MELLIN ESQ.,

CLINTON L. MATHIS, ESQ.,

Appeared on Behalf of the Plaintiffs.

FORD E. SMITH, ESQ.,

C. M. McCUNE, ESQ.,

Appeared on Behalf of the Defendant.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

January 31, 1951

Whereupon, the following proceedings were had
and testimony taken, to wit: [2*]

* * *

ROSS A. HIMES

a plaintiff herein, called as a witness by and on
behalf of the plaintiff, having been first duly sworn,
was examined and testified as follows:

Direct Examination

By Mr. Mellin:

Q. Will you give your full name, your age and
your residence, Mr. Himes?

A. Ross A. Himes. My age is 51. My residence
is 2607 South Santa Anita Avenue, Arcadia, Cali-
fornia.

Q. You are one of the plaintiffs in this action,
are you? A. I am. [10]

Q. Who is Addison N. Himes?

A. Addison N. Himes is my father.

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

(Testimony of Ross A. Himes.)

Q. Is he the other plaintiff? A. Yes, sir.

Q. Do you and Addison Himes do business in any fashion as associates?

A. We do business as the Nolox Company of America.

Q. And that is a partnership, is it, sir?

A. That is a partnership.

Q. What is the nature of that business of your father and yours?

A. The nature of the business of the Nolox Company of America is to grant licenses under patents which we have obtained upon my inventions, and receive royalties from the manufacturer under those licenses.

Q. What business were you and your father in prior to this business that you speak of?

A. The manufacture and sales of folding boxes.

Q. What was the name of that business and where was it located?

A. It was the Opening and Folding Paper Box Company, located at 1201 Park Avenue, Emoryville, California.

Q. How long was your father in that business, if you know?

A. My father has been in that business,—was in that business, up until the time we ceased manufacture, for [11] approximately 55 years.

Q. How long were you associated in the manufacture of paper boxes, sir?

A. From 1921 to 1938 would be 17 years.

Q. And '38 is the time when this Nolox Company came into existence, did it?

(Testimony of Ross A. Himes.)

A. The NoloX Company came into existence out of the manufacturing business in 1938; that is the partnership came into existence at that time.

Q. What became of the Oakland Box Company?

A. It was sold.

Q. Is the partnership the plaintiff, the owner of the partnership patent number 2,011,232 granted August 13th, 1935? A. Yes.

Mr. Mellin: I will offer that in evidence, your Honor.

The Clerk: Plaintiffs' Exhibit "1" marked for identification.

(Patent file marked as Plaintiffs' Exhibit "1" for identification.)

Mr. Mellin: Yesterday we noticed that the defendant had marked some of their exhibits with numbers rather than letters. There would be no objection [12] to us to take letters rather than numbers if it would be less confusing to the Court.

(Patent file marked as Plaintiffs' Exhibit "A" for identification, and received in evidence.)

Mr. Mellin: May I at this time also offer into evidence the certified copy of the file wrapper and contents in the matter of the issuance of the Parks patent, Exhibit "A." I offer that certified copy as file wrapper Exhibit "B."

(File wrapper marked as Plaintiffs' Exhibit "B" for identification and received in evidence.)

(Testimony of Ross A. Himes.)

Mr. Mellin: May I state to the jury, your Honor, that the file wrapper is a report of the proceedings in the Patent Office which resulted in arguments back and forth, which resulted in the issuance of the patents.

Are the plaintiffs the owners of the Himes patent number 2,243,421?

The Witness: Yes, sir.

Q. (By Mr. Mellin): Issued to Ross A. Himes, is that you? A. That is me.

Q. On May 27, 1941? A. Yes, sir.

Q. For a paper box and method of making the same? A. Yes, sir. [13]

Mr. Mellin: Number 2,243,421. May I offer this in evidence, your Honor, as plaintiff's Exhibit "C"?

(Patent file marked as Plaintiffs' Exhibit "C" for identification and received in evidence.)

Mr. Mellin: At the same time, your Honor, may I offer a certified copy of the file wrapper and contents in the matter of letters patent of Ross A. Himes, Number 2,243,421, as the next in order?

(Patent file marked as Plaintiffs' Exhibit "D" for identification and received in evidence.)

Mr. Mellin: May I read to the jury slightly from the patent, your Honor?

The Court: Those two claims, do you mean?

Mr. Mellin: No; I am not going to read from

(Testimony of Ross A. Himes.)

the claims, your Honor. I am going to read the general nature of the document.

The Court: All right.

Mr. Mellin: Maybe you have all seen patents, but here is the actual patent itself. It includes a drawing which in this instance illustrates the carton and method of making it, and then has descriptive matter describing how it is done. This says [14] “Whereas, Ross A. Himes, of Piedmont, California, presented to the Commissioner of Patents a petition praying for the grant of letters patent for an alleged new and useful improvement in paper boxes and methods of making the same, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and complied with the various requirements of law in such cases made and provided, and whereas upon due examination made the said Claimant is adjudged to be justly entitled to a patent under the law. Now therefore these letters patent are to grant unto the said Ross A. Himes, his heirs or assigns, for the term of seventeen years from the date of this grant the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.” That would be also true of the Parks patent which I will not bother the jury with.

Q. (By Mr. Mellin): You gave me, Mr. Himes, a box made in accordance with the paper box which you advised me was made in accordance with the disclosure of the Parks patent. Will you take the

(Testimony of Ross A. Himes.)

box which I hand you and tell me whether or not that is made in accordance with the disclosure of the Parks patent? A. It is.

Q. Would you show the jury, please, and describe slightly [15] what you are doing and the method of briefly how it is made and how it opens to perform its proposed functions?

Mr. Mellin: May I have that marked for identification, your Honor?

The Court: You may.

The Clerk: Plaintiffs' Exhibit "E" marked for identification.

(Paper carton marked in evidence as Plaintiffs' Exhibit "E" for identification.)

Q. (By Mr. Mellin): I hand you Exhibit "E" and ask you to proceed, please.

A. Ladies and gentlemen of the jury, this box which is known as a Parks box, exhibit "E" in the action here, is folded and glued into its present form—into its flat form—on an automatic gluing machine—folding and gluing machine, at the end of which it emerges in this flat state and is completed for its delivery to and use by manufacturers and packers for packing their articles therein. The advantages of this type of box are, as Mr. Mellin explained briefly some time ago, that when the box is to be used, all that is necessary to erect it for use and for interlocking non-returnable engagement of the bottom sections is to push it slightly on the ends. I think perhaps I had better do that [16] slower.

(Testimony of Ross A. Himes.)

I know how it works. Perhaps you don't. So if the jury will please notice the action of the side bottom panels and the lug extensions thereon, you can see that as the box is pressed from the ends, the arrangement of the bottom panels is such that the lug extensions on the side bottom panels approach one another, slide past one another and as the box reaches the open position, snap past one another which thereafter hold the box in an extended position while being filled; and after having been filled prevent the bottom of the box from falling through. The more pressure, in fact, that is applied to the bottom of this box once it is erected, the tighter the interlock will bite in the center. The mechanical action is such that once those lugs pass one another, and then pressure is applied either upward or downward on the bottom section, the lugs will press back toward one another in the direction from which they came and not allow the box to open. Therefore, in conclusion, it is entirely automatic and entirely load sustaining. Thank you.

Q. If you know, what is the strength of the bottom of the Parks package, exhibit "E" as compared with a box like it made with a solid bottom?

A. It is my opinion, Mr. Mellin, that a Parks box constructed as this one is constructed, once it is [17] erected, presents a stronger, more solid construction to support the contents than if there was simply a plain, glued end construction, formulated on the bottom of the box.

Q. Will you state whether or not it is possible

(Testimony of Ross A. Himes.)

to collapse that carton by upward pressure on the bottom of the box once it is in an erected position?

A. Upward pressure on the bottom of the box will not collapse this carton. The only manner by which this carton can be re-collapsed, once it has been erected is to reach the fingers inside and manually unlock the two lugs. I have just unlocked that with my fingers. Now it will go back and assume its flat form. I might add that usually that is not necessary because the box is not used more than once.

Mr. Mellin: I offer that in evidence.

The Court: Received.

(Exhibit "E" of the plaintiffs received in evidence.)

Mr. Mellin: May I have this marked for identification?

(Cardboard carton marked in evidence as plaintiffs' exhibit "F" for identification.)

Mr. Mellin: I hand you a carton which has been produced by the defendants, and there is no [18] question but what it is the defendant's box—and which we complain of, here, and ask you whether or not you have examined the structure and the method of operation of that box?

A. Yes, I have.

Q. Will you tell us the similarities if any and the differences if any between that box and the box—briefly of course—that you have been speak-

(Testimony of Ross A. Himes.)

ing of as following the disclosure of the Parks patent, exhibit "E"?

A. It functions in exactly the same manner and produces the same result as the Parks box.

Q. What about in construction, and will you demonstrate it to the jury, please?

A. Well, if the jury please, if they will take a look at the bottom of this box and its action, in comparison to what we just saw in the Parks box, you will see that the same pressure applied to the end corners of the box tends to open it. The lugs on the side bottom sections are approaching one another in the same manner. The center interlock is approaching one another in the same manner and when it gets to the center it snaps and locks in the same manner, in the same non-returnable interlocking engagement. Everything that I have said about the Parks box is true of this box. [19]

Mr. Mellin: May I offer that in evidence, your Honor, as the plaintiffs' next in order?

The Court: Yes, you may.

(Plaintiffs' exhibit "F" received in evidence.)

(Paper carton marked in evidence as plaintiffs' exhibit "G" for identification.)

Q. (By Mr. Mellin): By the way, Mr. Himes, you are familiar with the Parks patent and the Himes patent in suit, are you not?

A. Oh, yes.

(Testimony of Ross A. Himes.)

Q. And you rather thoroughly know what they teach and what they disclose?

A. Rather thoroughly.

Q. I show you a box blank and ask you how that compares with the disclosure of the box blank from which the box disclosed in the Parks patent in suit is made?

A. This is an accurately made sample of the disclosures in the drawings of the Parks patent, made according to the drawings in the Parks patent.

Q. As a matter of fact you made it yourself, did you not?

A. As a matter of fact, I made it myself.

Q. Can you briefly demonstrate with that blank how the box is put together—I mean the bottom is put together so it forms a box; that is, the relative relationship of the bottom flaps and so forth? [20]

A. Yes.

Q. Will you do it, briefly?

A. I will be glad to. These boxes are cut and creased in this manner to form this blank. During the process of folding and gluing, these side bottom panels are bent upward onto the inside of the box; the end bottom panels are bent upward onto the inside face of the box, while these glue flap extensions are doubled back into you might say a bellows fold or a double fold upon the flap to which they are attached.

The next process in folding and gluing is to apply glue by glue stencils on the machine, to cooperate areas in the bottom panels adjacent to those double-

(Testimony of Ross A. Himes.)

over flaps. Also glue is applied in a strip along the inside margin of the end panel opposite the other end panel which carries a glue flap to receive and adhere to that glued strip. So approximately half-way through the operation we have the box folded in this form and the glue is applied on the three places that I have just pointed out, after which the box proceeds through the machine in its travel and these end panels are folded over by means of folding belts until this end panel, as you can see, will come over onto the double folded portion, and the glued area will contact the glue flap. And in the same manner at the [21] end of the carton——

Q. May I interrupt you Mr. Himes; when you glue them, will you connect them with these paper clips? A. I will try. I don't believe I can.

Q. All right. Just go ahead. I am sorry that I interrupted you.

A. And similarly at the other end of the carton, the end panel is brought over with the glue flap coming down on the area on which glue has been deposited on the corresponding adjacent panel. Glue as you recall has been applied on the end strip of this panel which makes a contact with the glue flap at the other end of the box, which completes the folding and gluing operation, after which the box is delivered under pressure rollers in the machine to set the glue, squeeze it into the material, and then the boxes are stacked in the end stacking

(Testimony of Ross A. Himes.)

section of a gluing machine where they remain, slowly moving on an endless belt, until they are dried; after which they are taken out finished at the other end, packed in boxes and delivered.

Q. The box as dried is the box that is ready for erection by pressure on opposite corners?

A. That is right, Mr. Mellin, it will make the same box as was first shown to the jury. [22]

(Cardboard carton marked in evidence as plaintiffs' exhibit "H" for identification.)

Q. (By Mr. Mellin): I show you a blank which is a defendant's box opened up and ask you if you will compare the blank that you have just been testifying to which is exhibit "G" for identification, and tell us the differences in construction if any and the differences in operation if any between putting the box together and so forth, leaving out the precision gluing and steps except mention that they are glued together and without the precision machine steps; first, will you start with the difference in construction?

A. I hope the jury can see what I am trying to point out. It is a bit difficult, here. You will notice in viewing these two boxes, starting with the left—on the left side of the box with the side bottom section which is attached to one of the side panels, we have the same lug extension on the side bottom panel in this box.

Q. That is, the Chadwick box?

A. The Chadwick box. As we had in the Parks

(Testimony of Ross A. Himes.)

box, similarly on the outside panel we have the interlocking means depicted on the Chadwick box as we have on the Parks [23] box. It will be noted of course that in the case of the Chadwick box there has been some waste material left on this corner.

Q. Would you mark that "the waste material" please?

A. Yes. I might say that that waste material is in no way necessary to the operation of the box. It can be left on or off, as you will.

Q. Will you mark it in each instance where waste material occurs?

A. In each instance where waste material occurs I will mark the area with an "X."

Up to that point we have the lug sections and the interlocking means the same. The only difference we have found so far is that in the Chadwick box the waste material has been left on whereas in Parks it has been cut off. We also notice on that same panel that attached to those side bottom panels is what we term a glue flap attached to the panel by a diagonal crease line. Similarly on the other side bottom panel we have a glue flap attached by a diagonal crease line. That same construction, the glue flap, attached to one or the other of the panels by a diagonal crease line is carried in this Parks sample on the end panel in each case. That is an unimportant difference. The Parks patent as issued does not specify which panel shall [24] be used to carry the glue flap. All that would be necessary to do, to make these constructions identical with

(Testimony of Ross A. Himes.)

one another, then, would be to carry the glue flap on the Chadwick box on this end panel in the same manner as it is on Parks and carry this one on this side bottom panel on the end panel in the same manner that it is on Parks. That would then cut off this glue panel from these two side bottom sections and place it on the end bottom sections.

Q. I hand you a pair of scissors. Will you cut off the waste material and fold the end flaps to correspond with the showing of the Parks patent and explain what you are doing at the time, of exhibit "H"?

A. You want me to cut off the waste material that has been left on Chadwick?

Q. Yes.

A. And reverse the flaps as they are in Parks?

Q. Correct. Tell the jury what steps it is necessary to do to have that defendant's box blank conform precisely to the Parks disclosure.

A. I have just explained to the jury that these flaps, in order to conform exactly with the Parks construction as shown will have to be on the side bottom panel which would make me identify these flaps as shown on the Chadwick box with an "X" as waste material. [25]

Q. If you will, please.

(Witness draws on exhibit. Witness cuts a piece of the cardboard off.)

A. We shall cut off this corner as being unnecessary; We shall cut off this corner as being

(Testimony of Ross A. Himes.)

unnecessary; we shall cut the glue flaps from the side bottom panels.

Q. (By Mr. Mellin): They are actually waste material as far as the Parks disclosure is concerned, is that right?

A. They will be waste material if they are placed on these panels if there are glue flaps on the other panels.

Q. Now, will you form the glue flaps?

A. I have to form the glue flap on the end panel by simply bending it. (Bending piece of paper.) Now I think we will see the same disclosure in both boxes.

Q. By making those changes in the defendant's blank did you change its method of operation or affect the result in any fashion, Mr. Himes or not?

A. No. It will operate in the same manner and produce the same result, either way. Here we have a direct comparison between the side bottom panels in both cases and between the end bottom panels in both cases. I suppose perhaps I had better cut off a little bit more waste in order to make the picture clearer. This is unnecessary (cutting off piece of paper); and this is [26] unnecessary (cutting off corner of paper).

Now I believe we have it.

Q. Does exhibit "H," as you have changed it by clipping and bending change its operation from that of the defendant's box in exhibit "F"?

A. No, none whatsoever.

Mr. Mellin: I will offer the blanks previously

(Testimony of Ross A. Himes.)

identified in evidence as plaintiffs' exhibits "G" and "H."

The Court: Of course the waste material has been cut off.

Mr. Mellin: And we will clip the waste material to it.

The Court: We will take a recess. Ladies and gentlemen of the jury, you are not to discuss anything in connection with the case between yourselves or permit them to be discussed in your hearing. You are further instructed not to form any opinion upon the merits of the case until the court finally submits it to you for your decision. Might I have a stipulation from counsel that the admonition I have just given to the jury might be deemed as having been given at each recess and confinement of the jury without it being repeated?

Mr. Mellin: Yes, your Honor. [27]

Mr. Smith: Yes, your Honor.

(Plaintiffs' Exhibit "G" received in evidence.)

(Plaintiffs' Exhibit "H" received in evidence.)

(Recess.)

The Court: You may proceed.

(The following proceedings were had within the presence and hearing of the jury.)

Q. (By Mr. Mellin): Did you or anyone on your behalf make any survey to determine that

(Testimony of Ross A. Himes.)

prior to this Parks patent or sometime shortly thereafter there were any commercial boxes which were constructed and operated as you have described in conjunction with the Parks box and the defendant's box? A. There were none.

Q. Will you tell us what you did to determine that fact, if you did anything?

A. We submitted the box to practically all of the largest [28] paper box manufacturers in this country, many of whom were already our licensees on other types of boxes, and met a great deal of enthusiasm right from the start. They assured me that no such box had ever been produced commercially. I had never known of such a box having been produced commercially, myself, and they were quick to accept our licenses which would allow them to manufacture and sell these boxes.

Q. What was the disadvantages, if you know—you are familiar with the boxes of the type of which these boxes became supplanted if they did, which were used for the same purpose; what were those boxes and what were their disadvantages if any?

A. Prior to our introduction of this box, it was a general practice in manufacturing plants where the goods reached the point of packing to have to have a number of employees folding box flanges by hand, and inserting tabs into slots and so on; making the box and finishing the erection of the box by hand and stacking them up in large areas in an upright condition so that they wouldn't be a

(Testimony of Ross A. Himes.)

bottleneck at the end of the delivery belts when the articles were finished and ready to be packed. I have particularly in mind one instance which might be interesting.

In the dairy trade, where so many of these [29] five cent—maybe ten cent now—ice-cream bars are produced, popsicles and such, they had a condition there in what they called the freezer room, where these frozen articles were frozen in the freezers, and could only spend a very small amount of time from the time they were out of the freezers, packed into the boxes and put back into the freezers, so that they wouldn't melt, obviously. Most of these freezer rooms were limited for space. The procedure prior to the introduction of our boxes was for a crew of girls, women, to make up boxes by hand and stack them in an upright, open position all around the room, just giving themselves room to get in and out of the freezer doors, after which they would open the freezer doors, fill the goods into the boxes and put the boxes—the filled boxes—back into the freezer. Then they had to stop the whole operation until another whole room full of boxes was erected by hand. That was the general practice. We have completely changed that procedure in freezer plants because now all that it is necessary to do is to have a stack of our boxes, flat, such as this Parks box. They come to the customer delivered flat in bundles. A bundle is open somewhere in the room. At any time they can open those freezer doors, snap these boxes open, put the goods

(Testimony of Ross A. Himes.)

in them and put them back in [30] the freezer in no time at all. So we have made tremendous savings to not only that industry but to many, many industries where speed of erection of a box at the end of the packing line is an important factor.

Q. Now, you mentioned that there were licensees. Do you know how many licensees the plaintiff has on boxes? A. How many licensees we have?

Q. Yes. A. We have 21.

Q. Do they have more than one at one plant?

A. One has as many as 13. They have more than one at one plant. The number of plants, including the branches of these 21 licensees that are authorized under their licenses to manufacture and sell our boxes amounts to 48.

Q. Since 1946 have those licensees been under that license agreement and have they or have they not been licensed to produce under the Parks patent? A. Yes, they have.

Q. Have they done so or not?

A. All of them have produced boxes in conformance and with the teachings of the Parks box.

Q. Do you recall, Mr. Himes, approximately how many boxes have been produced by your licensees from February 1, 1946, to November 1, 1950? [31]

A. I had that list prepared by my bookkeeper. I don't recall the exact figure—something over three hundred million, I believe.

Q. I hand you a list which you gave me of licensees which are specified on one side; secondly what appears to be the number of boxes made by

(Testimony of Ross A. Himes.)

the licensees and then a third column of the net sales value of the boxes so made by licensees and ask you if that was made from your books—the books of the plaintiff—which were kept in the due course of business?

A. Yes; I ordered this list prepared by our bookkeeper from our books.

Q. And those books are under your control are they? A. They are.

Q. Would you tell us, please, the number of boxes which your licensees have produced shown on that list from February 1st, 1946, to November 1, 1950, the total number of boxes produced?

A. From February 1, 1946, to November 30, 1950, the total number of boxes produced by these licensees amounts to three hundred eighty million, two hundred fifty-two thousand, three hundred and six.

Q. Boxes? A. Boxes.

Q. What was the net sales value of those boxes, the total? [32]

A. The net sales value of those boxes was six million, eight hundred thirty-four thousand, six hundred and one dollars and ninety-three cents.

Q. If you would look at those licensees—do all of those licensees make their boxes following what you said was the disclosure of the Parks patent?

A. Yes, they do.

Q. Do they make all of their boxes that way?

A. Yes.

Q. Would you go down the list and tell us where each one of them is and from your knowledge if

(Testimony of Ross A. Himes.)

they all make Parks boxes or whether they follow one of the other patents or not?

A. Do you want me to read them?

Q. Yes, if you will; I would like the names of the box companies in the record.

A. The American Box Board Company, Grand Rapids, Michigan—in each case do you want the——

Q. No, that is all right, just the name.

A. They are all the same. All of these licensees manufacture their boxes according to the teachings of the Parks patent.

Q. How about the Standard Box Company of Los Angeles?

A. The Standard Paper Box Company of Los Angeles also manufactures boxes in conformity with the teachings of [33] the Parks patent. However, they make a small amount of folding bottom boxes under another of our patents which is disclosed in patent 2242341, one of the other patents in issue in this case, which does not carry an interlock in the center of the box; they make both.

Q. So that these boxes on here would come under either one or both of the two patents in suit?

A. Almost exclusively, with the exception of Standard Paper Box, under the teachings of the Parks patent.

Mr. Mellin: I will offer that list—that compilation in evidence as plaintiffs' exhibit next in order.

(List marked in evidence as plaintiffs' exhibit "I" for identification.)

(Testimony of Ross A. Himes.)

(Plaintiffs' exhibit "I" received in evidence.)

Q. (By Mr. Mellin): You gave me this morning what you told me were representative boxes made by a few of your licensees or a few of the boxes made by them; I hand you that bundle and ask you if those are all boxes made by your licensees and would you pick out those that would not include your description of the Parks patent, if there are any of them there? (Handing bundle of boxes to witness.) [34]

A. These are all representative samples of boxes made by our licensees and they are all made in conformity with the teachings of the Parks patent.

Q. As I understand it, the licensees are licensed—the ones that make the Parks boxes—are licensed under the two Himes patents and the Parks patent? A. That is right.

(Bundle of boxes marked in evidence as plaintiffs' exhibit "J" for identification.)

(Plaintiffs' exhibit "J" received in evidence.)

Q. (By Mr. Mellin): From your knowledge, what are the various types of products which are packed in these boxes, to your knowledge, by licensees? A. The list would be too long.

Q. Would you give me some of the extremes?

A. Practically anything that you can think of until it gets too large to be delivered in a folding bottom box.

(Testimony of Ross A. Himes.)

Q. Could you give us a few examples as to heavy and light weight?

A. We are not limited in the Parks construction to great amounts of weight or size. For instance, our licensees produced millions of boxes for the holding and transport of a half a dozen cans of beer. Other boxes are made [35] for beer bottles. We have had samples of boxes made under our licenses for the packing of connecting rods, tacks, tools, machine parts, practically everything you can think of.

Mr. Mellin: If your Honor please, I would like to have this box that I have in my hand marked for identification. Counsel I believe will stipulate it is a double blanked box made two at a time on a Staude Master Gluer, is that correct, counsel?

Mr. Smith: Yes.

(Paper carton marked as plaintiffs' exhibit "K" for identification.)

Mr. Mellin: May I have this marked for identification, Mr. Clerk?

(Single box marked as plaintiffs' exhibit "L" for identification.)

Q. (By Mr. Mellin): I hand you what appears to be a box blank or two boxes, rather, and ask you if you can identify it; and if you will tell us whether or not it is made by the method disclosed in the Himes patent in suit, to your knowledge; that is a box made by your [36] licensee, is it not?

(Testimony of Ross A. Himes.)

A. Yes. It is made according to the teachings of the Parks patent.

Q. Of the what? A. The Parks patent.

Q. Is it made by the method, can you tell, of the Himes patent? A. Yes it is.

Q. I give you another one just like it; can you open it up so as to show us the blank without destroying it?

A. You don't want it torn apart into two boxes; you want it opened up to show the blank?

Q. To show the blank, so you can explain the method of its folding (handing box to witness).

A. (Witness unfolds box.)

Q. From that blank which you have in front of you and from your knowledge of the Himes patent in suit, will you tell us the method which is practiced in forming the two boxes of that double blank starting from putting the paper into the machine?

A. I would be glad to, Mr. Mellin. But I would appreciate a little scotch tape before I start. In taking it apart I have separated the two boxes. (Witness applies pieces of scotch tape to blank box.)

This is what we term a double box blank, as set forth [37] in our patent number 2243421.

Now, I have described to the jury and to the Court the method of folding and gluing a single box a short time ago. The method employed in forming two boxes simultaneously in the one revolution of a machine from this double blank is essentially the same insofar as folding and gluing of the

(Testimony of Ross A. Himes.)

bottom sections inwardly upon the box and then carrying the end assemblies over for gluing to one another with the exception that the bottoms of both boxes are being worked on at the same time. The method would be as follows——

Q. By the way, would you stop there; was it new or old at that time to punch two or more blanks out of a sheet of material as they went through a blanking out die?

A. It was old and has been for many many years to nest two or more blanks on a cutting and creasing press for the purpose of making full use of that cutting and creasing press by cutting out as many boxes as possible on a sheet of material. However, theretofore in that process the boxes were simply cut and creased on the sheet and then were separated into single boxes before they were subjected to folding and gluing. It is new with patent number 2243421 with our invention represented thereby, to so cut and crease boxes so that [38] two remain attached together in pairs during the process of folding and gluing, packing and delivering to the customer.

Q. Would you show the jury how it is done, please?

A. Yes. These blanks are fed from a pile, one at a time, into a folding and gluing machine. They are picked up by the combing wheel from the feeding hopper. As they progress through the machine—again, these bottom panels are folded in on both sides, now, because we have two boxes; and the glue

(Testimony of Ross A. Himes.)

flaps are folded backwards to form the bellow folds on both sides rather than on one side as I indicated in the single operation.

Q. Simultaneous?

A. Approximately simultaneously. Glue is then applied to the panels carrying the glue flaps. Glue is also applied to both ends of the boxes simultaneously to cooperate with the end flaps which you see on the end of the double blank. Then as the box from that condition proceeds through the machine, the end panel assemblies, including both boxes, now, are brought over by means of a folding mechanism, belts, onto the body of the rest of the box. The glue flaps set down onto the areas that have been stencilled with glue; the other end is similarly folded over onto the body of the box including the assemblies, the bottom panels [39] and bottom panel extensions which are the glue flaps, which again sets the cooperating glued areas down onto the glue flaps, delivering the box into the delivery section and the pressure mechanism for setting the glue in that manner. The boxes have not been separated at any time during manufacture; in fact, they are packed and delivered to the customer in this manner.

Q. What is required to take them apart, to make two boxes of them?

A. Just pull them apart.

Q. Is each box then a separate box?

A. Each one is a separate box and will open automatically.

(Testimony of Ross A. Himes.)

Mr. Mellin: The blank which the witness has been testifying from and now has divided into two parts; I will offer the first blank, exhibit "M" in evidence.

(Plaintiffs' exhibit "L" received in evidence.)

(Carton marked in evidence as plaintiffs' exhibit "M" for identification.)

(Plaintiffs' exhibit "M" received in evidence.)

Q. (By Mr. Mellin): I hand you now exhibit "K" for identification, Mr. Himes; I offer you at the same time a duplicate of it. You may be advised that this double blanked box was made on a Staude master gluer. [40] Will you tell us, please if you are familiar with the construction or method of operation of a Staude master gluer?

A. Yes I am.

Q. Are you familiar with the manner in which that will fold and glue boxes? A. Thoroughly.

Q. Therefore, would you tell us please whether or not, after you—you have examined exhibit "K" before, haven't you?

A. Yes, I have examined exhibit "K."

Q. Would you tell us, please, the differences if any and the similarities if any between the manufacture of exhibit "K" on a Staude master gluer and that which you have just explained as the process of manufacturing a double box such as exhibit "L"?

(Testimony of Ross A. Himes.)

A. The method followed is exactly the same.

Q. Exactly the same?

A. Exactly the same.

Q. Would you open up the clear blank that I gave you——

Mr. Mellin: May I have that marked for identification as exhibit “K-1” your Honor so that they will be together?

The Court: Very well.

(Box marked in evidence as plaintiffs’ exhibit “K-1” for identification.) [41]

Q. (By Mr. Mellin): Would you open that up and answer a few questions for me, please?

A. Open it up into a blank form?

Q. Yes.

(Witness opens up folded form into an unfolded blank form.)

Q. (By Mr. Mellin): From your examination and your knowledge of the Himes patent in suit and your knowledge of the Staude master gluer, would you tell us whether or not the method used to produce the double box, which is before you marked plaintiffs’ exhibit “K” and exhibit “K-1,” employed a method of making said boxes from double blanks from which each cut and creased to form two box blanks having their box bottom forming parts at opposite sides of the double blank?

A. Yes.

Mr. Mellin: By the way may I advise counsel that I am reading elements of claim 1 of the Himes patent, your Honor?

(Testimony of Ross A. Himes.)

The Court: Yes.

Q. (By Mr. Mellin): Is each box blank cut and creased to form hingedly connected side and end walls connected in end to end series? A. Yes.

Q. As pointed out by you?

A. As pointed out by me. [42]

Q. Will you tell me whether or not the bottom sections form respectively the side and end walls?

A. They do.

Q. Will you tell us whether or not the two bottom sections each have a flap extension connected to an end thereof by a diagonal crease near and extending toward an adjacent inner corner of such section? A. Yes.

Q. What line is that?

A. That is these, (indicating)—lines.

Q. Would you tell us whether or not the walls of each box blank opens corresponding walls of the other box blank of the double blank—will you tell us what that is?

A. That means that these walls are opposite one another, these are opposite one another and these are opposite one another; corresponding walls of the two separate box blanks.

Q. Will you tell us whether or not the method employed in manufacturing the box “K” and “K-1” comprise the folding of said extension on the lower faces of the section to which they are respectively employed? A. Yes.

Q. Would you show us what is meant by that, please?

(Testimony of Ross A. Himes.)

A. When we speak of the extensions, we are speaking of these glue flaps. In each case when those are folded, no matter what machines the box would be made on, it is [43] necessary to fold those flap sections onto the bottom face of the flap to which it is attached in order to create the bellows fold or the double fold which I referred to earlier.

Q. When you say "Bottom face" do you or do you not mean the lower face?

A. It is the lower face of the box.

Q. Would you state whether or not the method then requires you to fold the respective bottom sections flat upon the upward faces of the connecting walls respectively, thereby to upwardly expose the flap sections?

A. Yes—I upwardly fold the flap sections, when these are folded in (indicating).

Q. Would you state whether or not that requires folding each assembly at the ends of the series upon the assembly series adjacent thereto, to cause said flap sections to engage cooperating areas of the adjacent assembly, respectively?

A. Yes, in this manner (illustrating).

Q. Does that method or does it not then require that you "glue said flap extensions to said areas"?

A. Yes.

Q. Then will you state whether you adhesively and hingedly connect the free end edges of the series of the walls [44] of the box?

A. Yes; that is accomplished by the application of glue on one end and the extension of glue flaps

on the other end by coming together in the final position and are glued, so (indicating).

Mr. Mellin: May I offer "K" and "K-1" in evidence?

(Plaintiffs' exhibits "K" and "K-1" received in evidence.)

Q. (By Mr. Mellin): Is exhibit "L" a representative sample of two boxes made at the same time by your licensees—those that make them two at the same time? A. Yes.

Q. What are the advantages, if there are any, Mr. Himes, in making these boxes two at a time as you have explained to us?

A. The advantage, Mr. Mellin, is almost entirely a manufacturing advantage. Obviously if you have a folding and gluing machine which has been built to produce one box or perhaps I should say fold and glue one box in a given time or a revolution of that machine, and by delivering double blanks to produce double boxes into the machine, and having two boxes made in the same [45] amount of time or in the same one revolution of the machine, that was formerly necessary to produce one box, you have doubled your machine time—doubled your production on that machine. That was the objective and that is what we accomplished producing the double box.

Q. Are there any other advantages? Are there any disadvantages?

A. There are no disadvantages.

(Testimony of Ross A. Himes.)

Q. Are there any disadvantages in delivering the boxes to the customer clipped together?

A. We haven't discovered any.

Mr. Mellin: Your Honor, the stipulation with regard to exhibit "K" was that the defendant manufactured exhibit "K" and ones like it on a Staude master gluer. Did you understand it that way? Mr. Hursh thought perhaps the stipulation wasn't clear, Mr. Smith.

Mr. Smith: As I understand the stipulation, exhibit "K" is the product of the defendant, we agree on that, and it was manufactured on a Staude master folding machine.

Mr. Mellin: Thank you. I just wanted to be sure that it was clear because it apparently wasn't clear to my associate. [46]

Mr. Smith: Yes.

Mr. Mellin: You may cross-examine.

Mr. Smith: Your Honor, it is now about five minutes of twelve.

The Court: Very well. Recess.

(At 11:55 a.m. o'clock, Wednesday, January 31, 1951, court proceedings recessed to 2:00 p.m. o'clock in the United States Courthouse.) [47]

Seattle, Washington, January 31, 1951
2:00 o'Clock P.M.

(All parties present as before.)

The Court: You may proceed, gentlemen.

ROSS A. HIMES

Cross-Examination

(Resumed)

By Mr. Smith:

Q. Mr. Himes, I believe you testified that you first engaged in the box business in 1921, is that right? A. That is right.

Q. And that that engagement in that business extended how long?

A. That engagement extended to the present time—not full time, however. There were some periods when I was away from the box business and then returned to it.

Q. When, for example?

A. The period between 1923 and about 1933.

Q. 10 years? A. About 10 years.

Q. What did you do during that period of time? [48] A. I was an actor.

Q. At the present time you and your father are the sole partners of this Nolox Company, is that correct? A. Yes.

Q. Do you have any other activities than the activities of that company? A. None.

Q. You spend all of your time on the affairs of the Nolox Company, is that right?

A. That is right.

Q. You regularly attend your office every day, is that right?

A. Our home office is in Emoryville and I live at the other end of the State. No, I do not attend the office every day; no, it is not necessary.

(Testimony of Ross A. Himes.)

Q. It is a business that may be operated by at least that remote a control, is that right?

A. Yes. I maintain an office in my home.

Q. The principal business of the NoloX Company, as I understand your testimony, is the licensing of this patent and other patents that you own, is that right?

A. Yes.

Q. You do not manufacture boxes?

A. Not now.

Q. No. And you have not since when? [49]

A. 1936.

Q. That is 13 years you have not manufactured boxes, yourself?

A. Yes.

Q. Did you ever know this man Parks of whom you have spoken this morning?

A. No.

Q. Or Hildebrand?

A. No.

Q. When did you first become aware of the existence of the Parks patent?

A. In 1943.

Q. How did you become aware of it?

A. I became aware of it during the course of a court procedure in Chicago, Illinois.

Q. What was the nature of that procedure?

A. It was an infringement procedure.

Q. Were you the plaintiff?

A. We were the plaintiffs.

Q. How did it come into that proceedings?

A. It was submitted by the defendants.

Q. In what capacity?

A. In evidence.

Q. In evidence, what kind of evidence?

A. I think it would be sufficient to say that that suit, [50] that action, was settled in the second day.

(Testimony of Ross A. Himes.)

The defendant asked for and was granted a license, and now is one of our business licensees under the Parks patent as well as under the Himes patent, it having been brought to our attention during that period that this Parks patent was in existence, and we having concluded from an examination of the Parks patent that a patent of our own—namely, patent 2284283—

Q. Not involved here, though?

A. Not involved here—read upon the disclosures of Parks patent. We wanting to respect anyone else's invention and not wanting to do anything that might put us in the position of infringing, ourselves—we immediately made an effort to and did purchase the Parks patent as soon as possible.

Q. What do you mean by the words "Read on" the Parks patent?

A. It was made according to the teachings of the Parks patent.

Q. In other words, there was language in your patent which when read, looking at the Parks patent, you found a response in the Parks patent, is that right?

A. Yes. We found that the Parks patent was a much stronger and of course prior patent to ours and the construction that we had covered with improvements in our own patent just mentioned. [51]

Q. In other words your patent then was limited by what you found in the Parks patent, is that right?

A. Our patent was limited?

Q. The patent that you had in suit, which you

(Testimony of Ross A. Himes.)

were reading upon the Parks patent, would be limited by what was found in the Parks patent, is that right?

A. That is true at that time, yes. We became the owners of the Parks patent.

Q. Isn't it true, then, that in considering any patent and whether or not it is valid, we consider what went before it? A. I believe so.

Q. Using the language of the profession, you might say, the later patent has to be viewed having the prior art before it, is that right? A. Yes.

Q. And the Parks patent was prior art to your Himes patent that you had in suit in Chicago?

A. Yes.

Q. What year was that action in Chicago?

A. 1943.

Q. What did you then start to do with respect to the Parks patent?

A. What did we then start to do?

Q. Yes. You have testified that you acquired title to it, [52] but what I am trying to get is, your testimony was that you acquired four-fifths of the title in 1946; what did you do between '43 and '46?

A. A great deal of the time I was in the army.

Q. I see. You were not trying to buy the Parks patent during that time?

A. Yes. We were trying to buy the Parks patent starting in 1943. The history of that purchase is quite a history. There were numerous owners, and those owners had to be tracked down and lo-

(Testimony of Ross A. Himes.)

cated in various parts of the Middle West. That accounts for our inability to complete the purchase of the last one-fifth until somewhere near 1948.

Q. And at the present time you believe you own one hundred per cent of the patent, is that right?

A. We do own one hundred per cent of the patent.

Q. What did you learn about the Parks patent in connection with its acquisition; was that invention ever used prior to your acquiring the patent?

A. It was never used commercially.

Q. When did the first commercial use take place?

A. To my knowledge, the first commercial use took place when we acquired the Parks patent and divulged it to our already established licensees on the Himes patents.

Q. That was sometime after 1946, is that [53] right?

A. I will have to clarify that this way: When you refer to the Parks patent, I assume that you are referring to the teachings of the Parks patent.

Q. Yes, sir.

A. And as I have already told you, we granted in 1943 that our own patent was made according to the teachings of Parks which stimulated us to buy Parks. I would then have to answer your question by saying that there were a great many Parks boxes—boxes made according to the teaching of Parks, made well before 1943.

Q. By whom?

(Testimony of Ross A. Himes.)

A. By our licensees. They were made according to the construction disclosed in the Himes patent which, if you will recall, followed the teachings of Parks; so I must refer to them as Parks boxes even though we didn't know until 1943 that they would be Parks boxes.

Q. Then actually they were dominated by the Parks patent at the time they were made, is that right?

A. Yes.

Q. That is what I understand you to say—that those many boxes before 1946, made according to the teachings of the Parks patent would have been infringements of the Parks patent, is that right?

A. That is right. That is why we made every effort to buy the Parks patent and succeeded in doing so. [54]

Q. And they were made by your licensees, is that right?

A. That is right.

Q. Then your licensees were infringing the Parks patent, probably?

A. Probably.

Q. Insofar as the owners of the Parks patent were concerned the patent was not being enforced, is that right?

A. They had shelved it. They did not use it. They attached no value to it.

Q. You might say that it was a paper patent, is that right?

A. I don't know what you mean by that term, sir.

Q. It was an unused patent so far as the owners were concerned?

(Testimony of Ross A. Himes.)

A. It was a patent which they had invented to be used and had been discouraged from pushing. In the first place, it must be remembered that at that time there was no machine capable of folding and gluing a Parks box until we invented and manufactured that machine under separate machine patents. I invented the machine that would make such a box.

Q. All by yourself?

A. No, not entirely by myself. I had the co-operation of very good machine builders and very good draftsmen. I spent two years in Boston, Massachusetts, for that purpose. The invention was mine, however—assisted [55] by good drafting and machine work.

Q. This is the box marked plaintiffs' "E" and this is known as plaintiffs' Exhibit "G." As I understand your testimony, those two boxes,—the one you have in your hand was made by yourself, is that correct?

A. This is a hand-made sample made by myself.

Q. I don't know what the testimony was about that flat model; did you make that one, too?

A. For your information I also made this one, sir.

Q. In making those, what information in the Parks patent did you rely upon to lay that out and cut it and glue it and so forth?

A. I followed the drawings depicted in the Parks patent, on the first page thereof, precisely.

Q. This is plaintiffs' Exhibit "A," which is a

(Testimony of Ross A. Himes.)

certified copy of the Parks patent. I call your attention to the second page and ask: Is this the drawing you are talking about? A. Yes.

Q. I note that the scale of the drawing is rather small; is that not correct?

A. Well, it would have to be small. It is hard to find a box that size.

Q. How do we get from this small drawing to this large piece of paper? [56]

A. You draw it in proportion; you raise your scale.

Q. You then adopt some proportion of one to ten or one to fifteen or something else?

A. That is right.

Q. What was the proportion that you adopted, there?

A. I can't recall that at the moment.

Q. How did you enlarge that in converting it from one to the other? A. By measurement.

Q. Did you use a ruler? A. Yes.

Q. If you found something in that drawing that measured a half an inch and the proportion was going to be twenty to one then you would have that same thing in your model ten inches; is that what you mean by proportional enlargement?

A. Are you speaking of this model, now?

Q. No; I am speaking of the large flat one that is before you there.

A. I would answer your question yes in regards to this model. This flat model was made to conform

(Testimony of Ross A. Himes.)

in size and shape to a similarly sized and shaped Chadwick box for the purposes of comparison.

Q. Is this the one that you were making it conform to? A. Yes, sir. [57]

Q. I believe this is Exhibit "H" (handing to witness)?

A. You will note that that is the same size throughout.

Q. I see. Then this Parks model lying underneath was purposely made to conform to the Chadwick model for the purpose of that demonstration you made this morning; is that right?

A. As to the size and shape, yes.

Q. And if that bottom, the Parks model laying out here flat and glued up, it would not necessarily come out to this exact proportion; is that right?

A. This Parks box?

Q. Yes. A. Yes, it would.

Q. It would be exactly proportional as this?

A. Do you mean exactly proportional to this drawing or would it function in the same manner and accomplish the same results?

Q. I am asking you in exact proportion to the drawings?

A. No, I don't think it would. I haven't determined that.

Q. Why do you feel you have the liberty to change these things?

A. I have the liberty to change these things because in the box business you can't form the same

(Testimony of Ross A. Himes.)

size box for different sized articles. You must have different sized boxes for different goods. [58]

Q. We will grant you that. Now will you go on and explain why you feel you have the privilege to alter the dimensions of these boxes to fit this defendant's carton?

A. Why don't I have the liberty?

Q. I am asking the questions.

A. Because both of these boxes are true copies of the disclosures of the Parks patent; whether it is the drawings, specifications or claims.

Q. Then what you are trying to say is this, is it not: That being a man of long experience in the box business, you have a skill, you have a knowledge of the box business and you can look at a drawing such as the Parks drawing and transpose that into a physical model to meet a demand of the customer or the demand of the occasion; is that right?

A. That is a very necessary part of box making.

Q. That is just an exercise of your normal skill, is that right? A. Yes.

Q. It doesn't require anything more than that; you don't have to be an inventor to do that?

A. To copy, no.

Q. To convert from a drawing to a physical model even though in converting you don't use the same proportions? [59]

A. No, I don't have to have any particular inventive ability to do that.

Q. Is the Parks box what is known as an automatic box? A. Yes, it is an automatic box.

(Testimony of Ross A. Himes.)

Q. Is there something about it that distinguishes it from other kinds of automatic boxes?

A. Yes; many things.

Q. Will you name one, for example?

A. In comparison to what other box, please?

Q. Oh, the Chadwick box as you found it before you cut off the waste material?

A. I have pretty well covered the differences and similarities, it seems, between the Parks box and the Chadwick box in this morning's testimony.

Q. Would you care to repeat them?

A. I wouldn't mind repeating them.

Q. Will you, please?

A. Not having means of reattaching my waste material I will have to refer to the sections that were cut off.

Q. I think we can facilitate that a little bit and,—we will introduce another blank which is just as it comes from the blanking machine.

(Blank box marked in evidence as Defendant's Exhibit "1" for identification.)

Q. (By Mr. Smith): Now, that has the parts that were [60] detached before earlier, is that right?

A. Yes, that is right. I will have to ask for the scissors and a pencil again, if you want me to repeat it.

Q. I will not ask you to mutilate that particular model; I am asking you to point out the differences you find in your box and your model of the Parks patent lying underneath.

A. Well, to repeat: Starting with the side bot-

(Testimony of Ross A. Himes.)

tom section on the left-hand end of the blank, it will be noted that that side bottom section of the box carries a central notch and a lug extending beyond an imaginary line between that center and the other corner of the section of the box adjacent to the other side of the lug. It will be noted that in the case of the Parks box, the extra or waste material on the corner thereof has been cut off. In the case of the Chadwick box, that corner of waste material has been left on.

Proceeding to the other end of that same panel, in the Parks box the glue flap attached to its panel is attached to an end bottom panel, whereas in the Parks box it is attached to a side bottom panel. In order to make these similar, the glue flap attached by that diagonal line would have to be cut off and re-created on the end panel adjacent to it. That same procedure applies to the other side bottom panel where [61] this waste material is cut off, the glue flap is cut off and placed over on the end bottom panel and a strip of waste material also is cut off of the bottom of each of the end bottom panels beyond the confluence of the two angle lines which would be created by so moving the glue flaps.

Q. Those are differences which you see, is that right? A. That is right.

Q. You say that in reconstituting the under neath box of the defendant to the structure of the Parks patent, we take and make a diagonal crease line, here, to give it the part that is similar to that; is that right? A. That is right.

(Testimony of Ross A. Himes.)

Q. Then this triangular piece that is going to be in here and is going to be used for the purpose here no longer functions in the box in the manner in which it does in the defendant's box; is that right?

A. It will function in identically the same manner because it doesn't make any difference to that structure whether it is on a Parks box or on a Chadwick box, on which of those two adjacent panels that glue strip is carried. The functional purpose is accomplished in the same manner whether that is carried on the side bottom panel or the bottom panel. If you are familiar with the Parks patent you know there is no differentiation made [62] on the panel of where those glue parts shall be carried.

We are speaking throughout the patent of two bottom panels—not four—two; each consisting of two bottom panels joined together to form this construction. It doesn't specify how they are joined together, that is, which of the panels carries the diagonal crease line.

Q. This part, then, that we have taken from defendant's box and used for a flap instead of the flap that is here does have a use in this box, does it not?

A. It is unnecessary; it is waste material in my opinion.

Q. It prevented you from folding that box down until you put your hand in there, didn't it?

A. Yes. People have seldom folded them back down once they are up.

(Testimony of Ross A. Himes.)

Q. These are the several boxes, Exhibit "J," and these several boxes I believe you testified were manufactured by licensees of yours?

A. That is right.

Q. Can you tell me whether or not they have a similar flap to one that you are going to use for another purpose?

A. Yes, they have.

Q. It is still waste material, in your opinion?

A. Still waste material. It is easier to leave it on than [63] it is to cut it off.

Q. I believe the Clerk informed me that there were ten; how many of these have that same element in this; does that one?

A. Yes.

Q. Does this next one?

A. Yes.

Q. All waste material?

A. Very probably all of them. I would be glad to tell you why.

Q. Does this one?

A. Yes.

Q. Doesn't that have a timing function in holding the parts of that box so when it is opened—

A. Not a timing function. It might possibly have some additional supporting function. We recognize that in our patent 2,284,283 which I have just explained to you, we followed the teachings of the Parks patent. The greater number of our licensees were established and operating under this Himes patent, just mentioned, before we acquired Parks. This Himes patent just mentioned included such an additional piece of material in its drawing and in the instructions we sent to our licensees for their manufacture of the boxes.

(Testimony of Ross A. Himes.)

Their habit therefore was to leave that piece [64] of material on, not to cut it off. It is just as easy to leave it on as it is to cut it off because as I say, it is waste material.

Q. Is it not a fact, though, that it does rub on the side wall of the box as the box is being erected?

A. Is it not a fact, that it does rub on the side wall of the box as the box is being erected?

Q. As we go through it?

A. It scrapes against the side panels until it reaches the horizontal position.

Q. There is no such arrangement as that shown in the Parks patent, is there? A. No.

Q. That is shown in the Himes patent?

A. That is one of the patents that we licensed over the Parks patent. Our licensees make use of not only the Parks patent but all of the Himes patents, too.

Q. When you issue a license do you furnish the licensees with samples?

A. With samples and detail drawings and instructions on how to manufacture.

Q. How to make the dies?

A. I am a die-maker. I usually go to the plants and instruct them how to use it.

Q. Therefore you were instructing your licensees how to [65] infringe the Parks patent; is that right?

A. I am afraid so, Mr. Smith; I might say unknowingly.

(Testimony of Ross A. Himes.)

Q. Is your ignorance excusable, however—an excuse, shall we say?

A. I don't believe that is for me to determine.

Q. However, upon your discovery of the existence of the Parks patent—in 1943, I believe you said?

A. 1943, yes, sir.

Q. —you became interested in acquiring title to it?

A. Very much interested, yes, sir.

Q. And it was for some primary reason, is that not right?

A. Oh, yes.

Q. In other words, we don't ever want to have something unless we have a reason for it; isn't that right?

A. We did not want to put ourselves in the position of infringing anyone else's invention.

Q. Possibly to protect the interest of your licensees?

A. Yes.

Q. What was there in the Parks patent that gave you concern in that respect?

A. In what respect, Mr. Smith?

Q. That you felt that you had to go out and protect your licensees' interest and you own interest?

A. I would say the entire patent gave us concern. We could see quite clearly that our licensees would be infringing [66] the Parks construction. We didn't want to have them in that position, so we purchased the Parks patent.

Q. How did your licensees infringe the Parks patent—by making boxes, is that right?

A. Yes, I guess that is right.

Q. We will say with four walls—was that the infringing feature?

(Testimony of Ross A. Himes.)

A. By making boxes with four walls?

Q. Yes. A. Oh, no.

Q. That is because the four walls were old?

A. A box with four walls, of course, was very old.

Q. And a box with a bottom was old?

A. A box with a bottom was old.

Q. Therefore they couldn't have infringed that feature, could they? A. No.

Q. A box with an automatic bottom, was that new or old at that time?

A. A box with a truly automatic bottom which when opened resulted in non-returnable inter-locking engagement of the bottom panels was new with Parks. When I invented the Himes patent I thought it was new with Himes. Therein you have your answer.

Q. I think we could paraphrase it fairly to say it was the [67] locking feature in the bottom; is that right?

A. The automatic locking feature against non-returnable engagement.

Q. Then we had at that time boxes with automatic boxes that closed down but they would collapse back up again if you pulled them upward; is that right?

A. Yes. I believe there were boxes—to my knowledge not in commercial production, however. Because as I pointed out we invented and produced the first machine to make that kind of boxes. But there were boxes that could be considered opened

(Testimony of Ross A. Himes.)

automatically but not inter-locked against re-collapse.

Q. The thing that distinguished the Parks box in your mind and made it so that you wanted to buy it was this non-returnable locking of the bottom; is that right?

A. The automatic non-returnable locking of the bottom, yes.

Q. Which will lie dormant and, so far as you know, had never been used by the patent owners up to that time?

A. To my knowledge, and from my investigation and information from many, many very important people in the box business or licensees mostly—to their knowledge and to mine that box had never been produced commercially. That probably accounts for us not having seen it prior to that [68] date.

Q. Do you insist that a box has to be produced commercially in order for it to be effective to teach us what might be in a patent showing that same box?

A. There are a number of different ways of looking at that; and being a practical box maker, I can't look at it any way but as follows: Whatever other so-called automatic boxes might have been laying in the patent files prior to that date, but not produced commercially, those constructions were available to the box-making trade generally and our licensees in particular. They are pretty smart men, most of them; they know the folding bottom box art.

(Testimony of Ross A. Himes.)

Those boxes were available to those men and to those concerns to make and manufacture and deliver without the payment of royalties. But instead they choose to accept our license and pay us royalties for all these years, under our patents, in order to make our box.

Q. So far as your licensees at that time were concerned, they believed, did they not, that under your license they had a right to make a box just as you see it there or modify it as you tell us you modified it?

A. I don't believe that they did. I wouldn't be certain, but I don't believe they were any more familiar with the Parks box than I was at that time. They were familiar with the Himes box, which I will repeat we recognized in [69] 1943 followed the teachings of Parks. That again accounts for the Himes construction rather than specifically the Parks construction being followed in all of these samples which you just had on the table, here.

Q. And in 1943 you probably then came to the conclusion that the Parks patent dominated the licenses that you were making?

A. We came to that conclusion.

Q. It also, did it not, anticipated your own patent which you were making in Chicago?

Mr. Mellin: If your Honor please, the word "anticipate" is a legal term.

Mr. Smith: I agree.

Q. (By Mr. Smith): With that change will you answer that question?

(Testimony of Ross A. Himes.)

A. Do you want to rephrase the question?

Q. We have just agreed that you concluded that the Parks patent dominated you and your licensees in 1943; is that right? A. That is true.

Q. Did you not also then conclude that the Parks patent topped what you thought you had patented in the Himes patent in 1943?

A. In part. [70]

Q. You say in part; apparently not all. How much did it dominate—where did it dominate?

A. It dominated the automatic non-returnable engagement feature. However, beyond that—over and above the Parks construction—we have certain features described and claimed in the Himes patent beyond the teaching of Parks which we thought were quite valuable, one of which was that little corner that you saw me scraping against the sides as it went down a while ago.

Q. We will just forget about that for the moment. It dominated the locking bottom and apparently taught the locking bottom, then; I mean it can't dominate it without teaching in the patent the thing it is going to dominate, can it?

A. It taught it.

Q. It taught it. And that existed from the date of this patent, which is 1935; is that right?

A. I just don't recall. It is down there.

Q. Well, would you say yourself as to the date, 1935? A. Yes; August 13, 1935.

Q. Do you consider a patent public knowledge?

A. Public knowledge?

(Testimony of Ross A. Himes.)

Q. What is contained in a patent, is that public knowledge? A. I don't understand.

Q. The existence of that patent from 1935, is that not [71] evidence that this thing which is disclosed here was known since 1935?

A. It might be known and it might not. It would only be known—only be sure to be known if someone was interested in that particular type of thing and made numerous searches.

Q. What do you mean by "searches"?

A. Well, searches for that kind of art.

Q. Where do you search?

A. Well, you might search perhaps in the patent office, Washington, D. C.

Q. How do you search?

A. I don't know that.

Q. How did you happen to use the term, then?

A. I have been quite familiar with that and similar terms in connection with patents for a good many years, Mr. Smith. I have, of course, taken out many patents, and those patents have been prosecuted, and that term comes to be—I knew as simply a layman, at the beginning—the first thing you do before you take out a patent is to instruct your attorneys to make a search of the records, a search of the patent office.

Q. Does the law require you to do that?

A. I don't believe the law requires you to do that; I am not sure. [72]

Q. Are there any searches that you know of

(Testimony of Ross A. Himes.)

that were made besides the one that you instruct your attorney to make?

A. Oh, you might ask questions; I don't know from whom.

Q. Do you search through the trade catalogues?

A. You might search through the trade catalogues. It might be that they would have a page given over to that sort of thing. I don't know. I have never seen such. It is possible they would be.

Q. Do you examine your competitors' products if you are a manufacturer?

A. I suppose that is the general procedure, yes.

Q. In the instance when you made application for the patent on which you brought suit in Chicago in 1943, did your attorney make a search there?

A. I believe he did.

Q. Did he then discover the Parks patent?

A. I don't know. That is what I hire attorneys for—prosecuting——

Q. Doesn't your attorney keep you informed of what takes place?

A. Not to that degree, no. I allow my attorneys to prosecute for patents. I pay the bills when he is through.

Q. And you also instructed an attorney to bring a suit in Chicago, didn't you? [73] A. Yes.

Q. And the defendant in that case produced the Parks patent, did he not?

A. He didn't produce the Parks patent in court. He brought it to our attention.

(Testimony of Ross A. Himes.)

Q. Well, you learned of it there for the first time?

A. We learned of it through the defense in that case, that is right.

Q. Had you known of it before, would you have had any doubt about bringing that action in Chicago? A. Probably.

Q. You have mentioned from time to time that you have worked in the development of folding machines. When was the first practical folding machine developed, to your estimation?

A. For the folding of what?

Q. Folding of paper boxes.

A. Folding of paper boxes in general terms?

Q. Yes.

A. I should say somewhere in the first ten years of this century.

Q. 1900—to 1910?

A. That would be my guess.

Q. Prior to that time how were boxes folded and assembled?

A. They were folded and glued by hand and then run through [74] what we refer to in the trade as a 4-roller gluer, which merely sets the glue into the material.

Q. How old are you? A. 51.

Q. How could you know what took place in 1900 to 1910?

A. I have a father who had been in the box business 55 years when he retired, and he is a very glib talker, Mr. Smith. I was thoroughly instructed in the box art by the time I was 15.

(Testimony of Ross A. Himes.)

Q. Assuming that back in the days when hand folding was taking place and you had a box like this—a Parks box before you—it would be laying on the table, I assume, before the operator; is that right?

A. Yes; a pile would probably be laying there.

Q. And he or she would probably have a glue pot some place near? A. Yes, and a brush.

Q. What would they do first?

A. If they wanted to make this box by hand?

Q. Yes, if they wanted to assemble that box by hand?

A. This is prior to folding and gluing machines?

Q. Yes.

A. Well, I dare say they would do the same thing that I described this morning, only by hand; in other words, they would fold over these bottom panels and fold the [75] glue flaps back onto the bottom panels to which they are attached. They would apply glue to either the glue flap or to the corresponding area, whichever is to receive it.

Q. It doesn't make any difference to which area the glue is attached?

A. That is right. Then they would take a brush and apply glue along one edge, here, and then they would fold and assemble these onto the body of the box so that the glued areas would meet the glue flaps. The end of the box, carrying the glue strip, would meet the glue flap and it would be manually pushed into this 4-roller gluer which would roll it and deliver it onto a table on the other side.

(Testimony of Ross A. Himes.)

Q. Where it might be put in clamps in addition, is that right—between weights or under weights?

A. It could be—under weights.

Q. Will you show the jury what the hand operation would be in getting it from the flat to this folded-over position that you were speaking about?

A. From the flat to the folded-over position?

Q. Yes, sir. A. By hand?

Q. Yes, sir.

A. You probably would do it with two hands. You want this [76] to be held back and this to be held down; that it would seem to me is the simplest way to do it.

Q. Simultaneously one part is turning 190 degrees into the box and glue flap is turning back; is that right?

A. One operator might choose to turn these down first and then this over; another one might choose to turn all of these up and then turn these back. I don't see that it would make any difference. The method followed is the same in all cases.

Q. Now, this morning you testified that with respect to this mold which was once two boxes joined together—but I believe you actually tore this one apart to show the jury what was taking place?

A. Well, it came apart and then put it back together.

Q. Then it was old for many, many years to make two boxes so that the lid parts all nested together; is that right?

A. That is too broad a question. It was old to

(Testimony of Ross A. Himes.)

cut and crease any number that would fit on a sheet. But it certainly was not old, until we did it, to cut and crease two boxes joined together in pairs in that manner, nicking the knives so that they would remain in pairs and continue to remain joined during the process of folding, gluing, stacking, wrapping, tying and delivering to the [77] customer.

Q. Can you point for the benefit of the jury on that Plaintiffs' Exhibit "K-1" what you mean by the "nicking of the knives"?

A. Yes, gladly. When boxes are cut and creased on a cutting and creasing press, the design is cut out and any intermediate cuts are made within the blank by means of steel knives held in place by sections of plywood, and it is all locked up tight and firmly so it won't fall apart under the pressure of the press.

All of the creases throughout that you see are accomplished in the same manner except a creasing rule is used instead of a cutting rule. So that when the pressure of the press comes on through the board which is up against the die, composed of the wood and steel knives and steel rules, we get the impression of a crease rather than a cut. Now, Mr. Smith asked me to identify the nicks which hold these two boxes together. Nicks are just what they sound like. They are actually nicks made with some instrument in the knives so that when that particular portion of the knife reaches the paper board, it will not cut; it will leave a little joiner or nick joining the two boxes together along this

(Testimony of Ross A. Himes.)

line (indicating). You can see the outline of the two boxes there; you can follow that. Those knives throughout [78] the length of this blank have been nicked in order to hold the two boxes securely together. They must not be separated until the folding and gluing operation is completed, until they are wrapped, put in packages, delivered to the customer and are ready for use.

Q. Then these nicks that you speak about in the cutting knives made it possible for two box blanks to hang together like this and be handled into a machine; is that right? A. That is right.

Q. Prior to that time, rather than having nicked knives we had smooth or straight knives, is that right, and we cut the cardboard through?

A. Not entirely, Mr. Smith. Nicks themselves are not new. Nicks have been used in box making practically ever since it started in order to hold a number of boxes on a multiple sheet. As I pointed out before, in box making practice it is customary to cut and crease as many boxes, nested as carefully as possible, on as big a sheet as you can on a cutting and creasing press in order to conserve time and material. Nicks have been employed sufficiently to hold the sheet together so it can come out of the cutting and creasing press onto the stripping table, where the bundles of boxes are taken apart.

Q. The nicks then are very old in box [79] making? A. Nicks and knives are old.

Q. That is right? A. Yes.

Q. With respect to arranging the box in a nested

(Testimony of Ross A. Himes.)

manner, I believe you testified it conserved paper, did you not? A. It does.

Q. And that is an old, common practice; is that right?

A. There again it would be old with other types of boxes, but it would be new as applied to folding bottom boxes. There is a distinction.

Q. Well, it certainly escapes me; would you care to explain? A. I beg your pardon?

Q. It escapes me; would you care to explain the distinction?

A. The nicks, that are employed in the nesting of these two cover sections in that manner, are both employed in this invention for the purpose of holding two boxes together during the process of folding and gluing so we can save 50 per cent of our machine time; whereas formerly the nicks were simply employed to hold a sheet of boxes together until they hit the end of the cutting and creasing press upon which they were separated then into single boxes. They were not kept in double boxes through the process of folding and gluing, and there is the distinction. [80]

Q. Is there any novelty as between this end wall—which, if you don't mind, I will mark "L" and this opposite one marked "M" on Exhibit "K-1," is there any novelty in having these tuck flaps that extend equally out and meet in the middle, in double blanking? A. No.

Q. Is there any novelty as between this wall "L-1" and this wall "M-1" in having a lid and a

(Testimony of Ross A. Himes.)

particular flap that extends from "L-1" to "M-1"?

A. No.

Q. And the same with respect to these upper walls which are merely duplications of the lower walls?

A. If you are speaking about the novelty insofar as cutting and creasing only is concerned——

Q. Double blanking?

A. Well, double blanking—through the process of cutting and creasing only, the answer is no, it is no novelty. It has been done for years.

Q. I am not talking about passing it through the whole machine; I am strictly talking about cutting and creasing.

A. There is no novelty.

Q. In that blank or any one that you use; is that right?

A. I cannot go along with you all of the way on that because there is a definite advantage and a purpose in [81] using that particular arrangement in folding bottom boxes which I have pointed out; to my knowledge, it has never been done in folding-bottom boxes, and there are claims in our patent which specifically cover that point.

Q. Irrespective of whether they are folding-bottom boxes or not, the top elements, the lid and the tuck flap, all operate the same?

A. If you ignore the bottom sections, that is old.

Q. This is Exhibit "C," a patent in your name you have testified, being the one here in suit?

A. That is right.

(Testimony of Ross A. Himes.)

Q. Have you ever read that patent proof from beginning to end? A. Yes, sir.

Q. Have you ever carefully studied the drawings? A. Carefully studied the drawings?

Q. Yes. A. Oh, yes, sir.

Q. Would you tell what figure 1 of the drawing shows?

A. Figure 1 of the drawing, ladies and gentlemen of the jury, shows a double blank similar to that of which we have been speaking.

Q. You are speaking of "K-1," I think, are you not?

A. Yes, similar to that, joined together with the nicks and the knives ready to be folded and glued in the double [82] manner.

Q. What does figure 2 show?

A. Figure 2 shows the same blank with a portion of the folding of the bottom sections having taken place.

Q. Could you demonstrate on this edge, for the benefit of the jury, what you mean by the folding of the bottom portions?

A. Yes. Figure 2 would show this same blank with the exception that the glue flaps—all four of the glue flaps have been folded under in this manner (indicating).

Q. And then figure 3 shows us what?

A. Figure 3 shows the bottom sections on both sides having been folded over onto the body of the box—and the same on the other side—and also shows by stippling the area where glue has been

(Testimony of Ross A. Himes.)

applied in preparation for the fold in the opposite direction.

Q. Which we all understand—one end in and the other end in?

A. These fold upon one another, that is true.

Q. Turning this back to its flat condition, that is what is shown on figure 1 as just a bare blank, perfectly flat? A. Yes.

Q. And in the next view this part had been folded under and the same over there, as such? [83]

A. That is true.

Q. And in the next one these parts had been turned over as such? A. That is right.

Q. Showing you then in figure 1, first condition, perfectly flat; figure 2, the flaps turned under; figure 3, the whole bottom elements being folded in toward the center of the blank?

A. That is what the figures show, yes.

Q. With respect to claim 1 of that patent which you are alleging the defendant infringes and we are claiming he can't infringe because it is not valid, you testified this morning and your attorney read to you from the claim? A. That is right.

Q. Had you read the claim, yourself, before he read it to you?

A. I have read those claims many times, Mr. Smith.

Q. You feel that you know exactly what they say? A. Exactly.

Q. Do you recall that the claim has an introductory clause or preamble that describes this double

(Testimony of Ross A. Himes.)

blank, all of that? A. Yes.

Q. And finally we get down to the words, "said method [84] comprising"; do you remember that?

A. Yes.

Q. From now on after those words we must be talking about the method of folding this box; is that right? A. That is what we are talking about.

Q. It reads in this manner: "Said method comprising folding said extensions on the lower faces"—what are the extensions? A. (Indicating.)

Q. That is right; they had glue on them originally in this particular box, did they not; they would be glue extensions or glue flaps?

A. Glue flaps.

Q. And it says here, "Said method folding said extensions on the lower faces of sections to which they are respectively joined"?

A. These sections, yes—on the lower faces.

Q. That is right; in other words, they are going to be laying flat as in this figure 2 that we talked about in the drawing a few moments ago?

A. Not necessarily; whether this face is pointed downward or upward, it is still the lower face of the box; it is the bottom of the box.

Q. A lower face means that it is a face that is exposed downward, isn't it? [85]

A. When you are speaking of a box, with a bottom, the lower face is the bottom of the box in my interpretation.

Q. It could also be the outer face of the bottom, couldn't it?

(Testimony of Ross A. Himes.)

A. Well, it would be more accurate to say the lower face of the box, I think.

Q. Of the bottom? A. Yes.

Q. Then this grey face that we see is apparently the upper face?

A. Not necessarily. That is the inside of the box.

Q. Well, when is it an upper face and when is it a lower face then; if it isn't necessarily an upper face it must be a lower face, must it not?

A. I would say that the upper face of this box is the upper face of the top of the box, if you are speaking about a box.

Q. We are not talking about a box. We are talking about a box blank, a double blank which is laying on the table or in a machine ready to be folded; it lays horizontal, does it not?

A. Yes.

Q. And passes through the folding machine horizontally, does it not? A. Yes. [86]

Q. And in that folding machine it has an upper face and a lower face?

A. The blank would have an upper face and lower face, yes.

Q. All right, will you tell us which would be the upper face and which would be the lower face?

A. When the blank is flat?

Q. Yes.

A. This would be the lower face of this particular section.

Q. Of the whole blank, which would be the lower

(Testimony of Ross A. Himes.)

face, in the folding machine?

A. The lower blank, here (indicating)—here.

Q. Everything that is pointing down on the table is the lower face? A. Yes.

Q. “Folding said extensions on the lower face of section, to which they are respectively joined.” Will you try to fold the blank to follow that?

A. (Folds blank.)

Q. Semi-colon following the word “joined”—what does a semi-colon mean, the end of a thought?

A. I couldn’t define that for you.

Q. “Folding the projecting portions flat upon the upper faces of their connected walls.”

A. Yes.

Q. That is as it appeared in figure 3 of the drawing, is [87] that not right?

A. I think so.

Q. We have already gone through two steps, then, haven’t we now? A. Yes.

Q. Following this statement here appears these words, “Thereby to upwardly expose the flat extensions.” A. They are upwardly exposed.

Q. In other words, this last folding over operation exposes those flat sections, for the first time, isn’t that right?

A. I wouldn’t go so far as to say that. We have made no sequence here. We are describing necessary operations to the folding without regard to the particular sequence in which they may come. I don’t believe that you could pin that method down to any particular sequence of folding operations as

(Testimony of Ross A. Himes.)

long as the manner in which it is folded and the result accomplished is the same. There might be mechanical differences between two machines that would do this folding operation. However, if the method—these folds are all made on both machines, and the final result is the same. Your language in claim 1 of the Himes patent still covers both of them. That is my opinion.

Q. Whether we do this and then this, or whether we do this [88] and that all at one time?

A. In the same manner we described a little while ago with someone making these by hand, it would be up to the discretion of the operator to determine how the mechanical means were arranged to accomplish the same purpose—not a different purpose; the same purpose.

Q. What is the purpose of the claims in a patent, if you know; will you tell the jury?

Mr. Mellin: If your Honor please, I believe the Court will instruct the jury on that point as a matter of law.

The Court: Overruled.

A. The purpose of the claims of a patent?

Q. (By Mr. Smith): Yes, sir.

A. Well, now, I am not a patent attorney so my language might not be accurate.

Q. We understand.

A. It is my understanding that the purpose of the claims of a patent are to describe what is new, an invention, and therefore patentable. Is that enough?

(Testimony of Ross A. Himes.)

Q. There is only one word. You said "to patent"—I stated "Define." It defines a patent, doesn't it?

A. Yes.

Q. Would you care to look at exhibit "C," your own patent and state how many claims are in that patent? [89]

A. Nine.

Q. That is, in effect, that patent covers nine inventions as defined in that claim, isn't that right?

A. I am not sure whether that is true or not. You describe your inventions in various ways in various claims of a patent.

Q. One claim, one invention, is that right—and maybe the next one would be changed slightly, so you have got a second claim, is that right?

A. I don't know.

Q. However, there are nine claims in that patent?

A. There are nine claims in the patent. [90]

* * *

Q. (By Mr. Smith): On page 4 of the defendant's exhibit "2," which is a copy of the patent, appears a phrase headed "Disclaimer." Would you care to read that to the jury?

A. Yes. It is headed "Disclaimer." "2243421, Ross A. Himes, Piedmont, California, paper boxes and method of making same. Patent dated May 27, 1941. Disclaimer filed October 24, 1941, by the assignee, Nolox Company of America. Hereby enters this disclaimer to claims 2 and 6 in said specification, official gazette, November 18, 1941."

Q. It was through some action of yours that that

(Testimony of Ross A. Himes.)

became of record in the patent office, is that right?

A. Yes. Through some action of my attorneys at that time.

Q. I beg your pardon?

A. I instructed my attorney to seek those disclaimers, under his advice. [91]

Q. Did you understand the effect of that act?

A. Yes.

Q. What was it?

A. The effect of that act was to disclaim the method described in making a single folding bottom box—not a double folding bottom box. Those claims disclaimed both referred to single blanks or single methods. We didn't feel that they were valid claims so we had them stricken out.

Q. You gave up the inventions that apparently were defined by those claims, is that right?

A. That is right.

Q. What caused you to believe they were invalid?

Mr. Mellin: If your Honor please, the same objection.

The Court: Sustained.

Q. (By Mr. Smith): In your reading of your own patent, when is the last time you read through that patent?

A. I have no idea, Mr. Smith.

Q. Yesterday? A. No.

Q. Last night? A. No.

Q. Today?

(Testimony of Ross A. Himes.)

A. No; probably sometime within the last [92] year.

Q. Have you read claim 3 of that patent recently?

Mr. Mellin: The same objection, your Honor.

The Court: The same ruling.

Mr. Smith: That is all.

Mr. Mellin: No further questions. [93]

* * *

NOBLE ANDRE

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Smith:

Q. Mr. Andre, will you please state your name and residence and occupation?

A. Noble Andre. My residence is San Francisco, and I have my own firm—the Andre Paper Box Company of San Francisco. Our offices are in San Francisco and our plant is in San Leandro, California.

Q. Can you give us in very round figures the gross volume of your business annually?

A. Well, our business exceeds one million dollars a year; it varies in excess of one million dollars.

Q. When did you start in business?

A. Well, this firm—the Andre Paper Box Com-

(Testimony of Noble Andre.)

pany, I started in 1936. However, I started in the industry, I believe, in 1932.

Q. Where did you start in business?

A. In Los Angeles. [102]

Q. In Los Angeles; in 1932?

A. No. I worked for my brother in 1932 for one year and then started a plant with another partner in 1933. I sold out to him in '34 and then came to San Francisco and worked two years for two different firms, and then started in business for myself.

Q. I wish you would tell the jury briefly the type of box you make?

A. We manufacture what we call folding paper boxes, boxes in some respects similar to the boxes we have been seeing this morning along with various other types of gift boxes, cake boxes and all of the boxes which are folded flat and in turn into boxes.

Q. Do you make automatic boxes?

A. Yes, we make several types of automatic boxes.

Q. Have you ever considered whether any of the boxes which you made you might not have a right to make?

A. Yes; very carefully. I mean we are constantly looking for new ideas and patents ourselves and are in constant touch with patent attorneys ourselves. We have three patents pending, ourselves; on different types of boxes.

(Testimony of Noble Andre.)

Q. Has this plaintiff taken any action with respect to your activities?

A. Do you mean—— [103]

Q. Mr. Himes?

A. Yes. There is a suit, I believe, filed against us at the present time for infringement on, I believe, the Parks patent.

Q. You are familiar with the Parks patent?

A. Yes, I am.

Q. Have you examined it and read it?

A. Yes; very carefully.

Q. Do you have any——

Mr. Smith: I might say for the convenience of the jurors and everyone involved we have had an enlargement made of the drawing of the Parks patent and it has been offered for identification as Exhibit "11."

The Court: Have you seen it, Mr. Mellin?

Mr. Mellin: Yes, I have seen it, your Honor. It is all right.

(Defendant's Exhibit "11" received in evidence.)

Q. (By Mr. Smith): What is there, in your opinion, in the Parks patent, the box structure according to that patent which may be unique?

A. I don't follow what you mean, there.

Q. All right.

Mr. Smith: Strike that question. [104]

Q. (By Mr. Smith): In your examination of the Parks patent, what type of box did you find

(Testimony of Noble Andre.)

would be made if a box were made according to it?

A. Well, it is an automatic sort of lock bottom.

Q. In other words, it discloses to you as a box maker an automatic lock bottom box?

A. That is the definition, I believe, which we use in the industry.

Q. Do you know of any other patents on lock-bottom boxes?

A. Yes. We have discovered several of them.

Q. Can you think of one in particular?

A. Well, there is one called Berkowitz that we discovered—Berkowitz or something.

Q. Is this a drawing of that box?

A. Berkowitz's, yes, this is it.

Q. What is taught there?

A. Well, this box here definitely shows it has the same principal of the locking feature; that is the part that we liked about that—is that it automatically locked.

Q. The same as what, Mr. Andre?

A. The Parks box—diagonally along the same lines.

Q. What you are testifying is that there is a similar element that you find in the Berkowitz patent as to something you find in the Parks patent, is that right?

A. That is right. [105]

Q. Can you give us the number or some identifying characteristic of the part in the Parks patent that you find in the Berkowitz patent?

A. Well, I believe they have a number here that

(Testimony of Noble Andre.)

says—is that “72” that points to that notch or is it this one?

Mr. Smith: I believe you will agree it is 72, won't you Mr. Mellin?

A. And this one here, I believe, is “22.”

Mr. Smith: Will you agree it is “72” that points to that notch?

Mr. Mellin: Oh, yes.

Q. (By Mr. Smith): Will you draw a numeral around the figure “72”?

A. (Witness draws.)

Q. And will you draw around something you find is similar in the Berkowitz drawing?

A. (Witness draws.)

Q. Are there any other elements in the Berkowitz that you find are similar in the Parks?

A. The fact that the inner walls here fold in, and when you press the sides of the box they will fold back.

Q. Is that something similar to something you see in Berkowitz—how the bottom elements fold in, as you explained?

A. Well, these drawings illustrate it. If you had a model [106] I could tell you a lot better by a model.

Q. Unfortunately, we don't have one at the moment. One similarity, now, that you are talking about is the inner and upper folding of the bottom elements between the sides?

A. That's right.

Q. In the flat condition?

A. Yes, sir.

Q. Is there any other thing in the Berkowitz

(Testimony of Noble Andre.)

patent which is similar to some thing in the Parks patent? Maybe I could simplify it for you, Mr. Andre. Would you tell the jury in your own language the similarities that you find—just point them out and call them by number as you go along?

A. Well, fundamentally all of the boxes from the top part are the same, with the locking features in the center the way these are shown—the bottom portions fold up and attach to the outside walls in both cases, however, in slightly a different manner. But the primary purpose or the accomplishment is the same. In my own office we have made up samples of these boxes along with two other types of boxes. The end result is exactly the same, in other words, it comes out the same way. We particularly liked the Berkowitz patents for the reason that this center locking— [107] when the box was opened that it created a lock and held it rigid.

Q. Berkowitz's does that, is that right?

A. Yes. So we have been using on one type of box, recently, certain features of that box, ourselves.

Q. You feel you have the right to do that?

A. Well, yes. I have noticed here it was filed in 1925 and it has long been expired.

Q. Just so there won't be any confusion about it—the filing date doesn't have anything to do with the expiration date.

A. I see another date there. I see it is February 5, 1929—I guess it is 17 years after that.

Q. 17 years after 1929 would be when?

(Testimony of Noble Andre.)

A. 1946. That would be expired.

Q. That means that that has expired. I think that is a proper conclusion.

The Parks patent and boxes built according to it, such as Plaintiff's Exhibit "G" laid there before you, is that identical with the blank, Defendant's Exhibit "1," in your estimation?

A. No. It is a variation of it. It isn't identical.

Q. How does it vary?

A. I see that the diagonals are on different panels, and the notching of the center arrangement is something we [108] have noticed that is a variation. This particular one follows along the line of the Parks—not the Parks, but that other patent there. It has the curved effect which allows it, when the box is engaged, a little easier than does Parks with the notch in it.

Q. You think that the round end as in 24 Berkowitz is that way? A. Yes.

Q. Would you hold that Exhibit "1" on top up so that the jury can see, the point clearly to what you mean by that?

A. Well, that this locking which is in the center of the box when they are closed—around there it works a little better than this notched effect.

Q. And you feel that that is borrowed from the teaching of this Berkowitz patent?

A. Well, I can see it right there, yes.

Q. Would you draw an arrow pointing to one of those ends on that Berkowitz patent which gives you that idea?

(Testimony of Noble Andre.)

A. The center feature; that is the one that is marked "22." And over in this section it is marked as "21-B."

Q. That is where you have drawn the circles around the box, there? A. Yes.

Mr. Smith: No further questions. [108-A]

Cross-Examination

By Mr. Mellin:

Q. Mr. Andre, if I tell you this fact—that this Berkowitz patent was before the Patent Office and was referred to in the Patent Office during the prosecution of this Parks patent, and the Parks patent was issued in spite of the fact that Berkowitz had already been in the office and considered by the Patent Office, would that change your opinion as to whether or not they are substantially identical?

A. I can't—they certainly look identical to me. I don't understand the legal phases of it.

Q. You started making automatic boxes within the last year, haven't you, of the type that you are being sued upon in San Francisco?

A. No, I would say——

Q. Sometime during '50?

A. No. First we had—I believe it was in 1947—we had an application and letters patent for an automatic box that has no glue at all—in other words, the side seams are not glued at all—which has a locking feature, also, but I mean it is not glued.

(Testimony of Noble Andre.)

Q. I think I can save you time. I mean of the type which you are making which you are alleged to have infringed [109] the Parks patent with?

A. I would say about two years ago.

Q. The suit was brought in October of last year; does that help you out?

A. October of last year?

Q. Yes.

A. I would say it might have been two years prior to that—between one and two years.

Q. In those boxes you didn't cut the box blanks as shown in the Berkowitz patent did you?

A. Certain features of it—no, not the box in its entirety.

Q. Or the bottom flaps weren't cut as shown in Berkowitz were they?

A. I don't follow you.

Q. These flaps that form the bottom weren't blanked out as shown in the Berkowitz?

A. One order we did. We have tried every version. We have been trying everything. I have got some inventors down there that do everything.

Q. And one reason that you are doing that is because you are trying to find a box that doesn't come within the Parks patent?

A. The whole issue seems to be so confused—just to find another one if we can. [110]

Q. I see. In the boxes that you made, you didn't run the boundary line of this lug out here to the corner so that the two didn't overlap at the corner, did you?

(Testimony of Noble Andre.)

A. Frankly, I couldn't testify exactly as to how. All I know is that on these center parts—the only way we could have made it and the only way they will engage is that that was the main feature. What they would do is similar like these two; they put the diagonals here and the diagonals there. It is really so confusing—I just sit there—I have two fellows in our office that handle this. They go to the attorneys and I sit there and then excuse myself. I am not an expert at reading the drawings. If we had a model I could show you.

Q. The model that I hand you here is more like the one that you are being sued upon, isn't it?

A. Well, now, to me it is similar right in that instance. Our glue flaps are on the other end but——

Q. In other words, from an actual blanking out it is closer to the box I have handed you than to the Berkowitz patent, isn't it?

A. The one on which you are bringing suit? Oh, yes, definitely.

Mr. Mellin: May I have this marked next in order? [111]

(Carton marked in evidence as Plaintiffs' Exhibit "N" for identification.)

Q. (By Mr. Mellin): Are you contributing financially to this suit we are in—in any way at all?

A. I merely came for my own information to find out.

Q. Didn't your attorneys take Mr. Himes' deposition in San Francisco at your expense?

(Testimony of Noble Andre.)

A. Not to my knowledge.

Q. You knew his deposition was being taken there by your attorneys?

A. I believe they have already taken it.

Q. You knew they were taking it?

A. Yes.

Q. Do you expect to pay for that or not?

A. I was talking to Mr. Chadwick. I think now that I see the situation that we weren't definitely committed to pay for it. But I feel in my own mind we are getting a lot of benefit out of this and now we are going to pay for it.

Q. In other words, this suit might determine your suit in San Francisco?

A. Very definitely. They told me that it had a lot of bearing there and I told them I would stand that. [112]

Q. As I understand your testimony you said that in the office or in your plant you had made a couple of samples of this Berkowitz box following it?

A. Identically following it, yes.

Mr. Mellin: That is all.

Mr. Smith: That is all, Mr. Andre, thank you.

(Witness excused.)

Mr. Mellin: I offered that box in evidence to illustrate the witness' testimony.

The Court: Exhibit "N"?

Mr. Mellin: "N" like in Nellie.

(Carton, Plaintiffs' Exhibit "N" received in evidence.)

Mr. Smith: The defendant would like to introduce Exhibit "1" in evidence. There seems to be a confusion your Honor. The clerk believed that Exhibit "2" was rejected. I believe that Mr. Mellin did not object to Exhibit "2." The witness read from it. It was a copy of his own patent.

Mr. Mellin: I have no objection.

Mr. Smith: I would like to offer it in [113] evidence.

(Defendant's Exhibit "2" received in evidence.)

Mr. Smith: Exhibit "3" is a Nalley's box. It is also known as Exhibit "3" in the Himes deposition and was marked by the plaintiffs in answering certain of the defendant's interrogatories. This particular model is already part of the deposition. We are offering it also as Exhibit "3" in this case. A copy of the Berkowitz patent number 1700733 is offered as Defendant's Exhibit "4." A photostatic copy of a British patent issued to a man named Filmer is offered as Defendant's "5." I believe you have no objection?

Mr. Mellin: No objection.

Mr. Smith: A French patent to a man named LeBlanc is offered as Defendant's Exhibit "6." A copy of an American, a United States Patent to a man named Cramer is offered as Exhibit "7." A soft copy of a Neumann patent is offered as Exhibit "8." The Morris patent as Exhibit "9," and of the Rutledge patent as exhibit "10."

And the enlarged views of the drawings of the

Parks and Berkowitz patents are offered as Exhibits "11" and "12"; Parks is "11" and Berkowitz "12," your Honor. [114]

(Defendant's Exhibits "3," "4," "5," "6," "7," "8," "9," "10," "11" and "12" received in evidence.)

Mr. Smith: I would like to call Carl Thom.

CARL W. THOM

called as a witness by and on behalf of the defendant, having been first duly sworn, was questioned and testified as follows:

Direct Examination

By Mr. Smith:

Q. Will you state your full name and spell the last name? A. Carl W. Thom, T-h-o-m.

Q. Where do you live, Mr. Thom?

A. Seattle.

Q. How old are you?

A. 54—I will be 55.

Q. What is the nature of your work?

A. Well, I am a sample maker in a cylinder cutting press.

Q. In what kind of a——

A. In a folding box plant.

Q. For whom do you work?

A. For Mr. Chadwick.

Q. The defendant in this case? [115]

A. Yes.

(Testimony of Carl W. Thom.)

Q. How long have you worked in the folding box business?

A. I started in 1916 and I was out about four years. That makes about 31 years.

Q. That is a long time. A. It sure is.

Q. Where have you worked in the folding box business?

A. In Los Angeles, San Francisco, Oakland, Tacoma, Seattle.

Q. All up and down the Pacific Coast?

A. Yes.

Q. You said that you were a sample maker; can you explain for the benefit of these people what a sample maker is?

A. If a customer wants a certain box I make the sample for him to put his product in. He usually has a style that he wants and I make the sample so that we can have the die made from that sample if it is okay with the customer.

Q. Do you originate the sample just out of your mind?

A. Not always. In some cases I have had to; in some cases there are little changes to be made in certain types of boxes that we make them fit the kind of product that goes in them.

Q. With respect to the features that you build into a box where do you get the information as to how a sample is [116] to be made?

A. How is that now?

(Question read by the Reporter.)

A. That usually comes from experience. It all

(Testimony of Carl W. Thom.)

depends on the article that goes into the box, the type of box that the customer wants. They are all designated by certain names—the boxes are. It all depends on the customer's wants, too.

Q. How do you learn what the customer's wants are?
A. I beg your pardon?

Q. How do you learn what the customer wants?

A. He usually has his own idea. As a general rule they have their own idea of the type of box they want.

Q. How does he get that idea to you?

A. He tells the salesman and the salesman tells me.

Q. Do you sometimes talk to the customer, too?

A. Sometimes, yes.

Q. And sometimes it comes through the salesman?
A. That is right.

Q. By word of mouth or what other means?

A. No; they usually have requisitions. They have written down requisitions, and the information is given to me on a requisition.

Q. Are drawings ever furnished you?

A. Sometimes sketches, but I can hardly read them. [117]

Q. You testified that you were a cylinder press man, I believe?

A. Yes; cylinder cutting press man.

Q. Cylinder cutting press man?

A. Also a platen cutting press man, too.

Q. Is that a recognized trade?
A. Yes.

(Testimony of Carl W. Thom.)

Q. Does it have various grades of apprentices and journeymen? A. Yes.

Q. Which are you?

A. 31 years, I ought to be a journeyman by now.

Q. Do you recall off hand when you first became a journeyman?

A. No, I don't. I imagine, though, it was probably two or three years after I started.

Q. Two or three years after 1916?

A. That is right.

Q. I see. Are there any other operations around a box folding plant that you may perform?

A. Anything in the general work in a folding box plant I can usually get away with. Printing is out of my line.

Q. Do you run a shear? A. Yes. [118]

Q. Do you run any other machinery?

A. Folding gluers and waxing machine.

Q. What kind of folding gluers are you familiar with?

A. What they call straight line; it is an automatic straight line gluer.

Q. Does it have a particular name that it is designated in the trade?

A. Yes, Staude, International; there are several different types but those are the two that I am familiar with.

Q. Have you ever seen drawings such as appear in Defendant's Exhibits "11" and "12," Mr. Thom? A. Yes.

(Testimony of Carl W. Thom.)

Q. Do you understand that those are patent drawings? A. That is right.

Q. Have you read the patents?

A. Do you mean the explanation of them?

Q. Yes, sir.

A. Not completely, no.

Q. You have studied the drawings?

A. Studied the drawings, yes.

Q. Have you ever done anything with respect to what you learn in those drawings?

A. I have made samples of them.

(Carton marked as Defendant's Exhibit
"13" for identification.) [119]

Q. I hand you Defendant's Exhibit "13" and ask you to tell me what it is; in handling it I would prefer that you probably not expand it any farther than you have at the moment. What is Exhibit "13"? A. That is Berkowitz's patent.

Q. What do you mean?

A. A Berkowitz patented model.

Q. It is a model? A. Yes.

Q. Do you know whether or not you made that?

A. Yes, this looks like my work. It definitely is.

Q. Is there some particular characteristic that tells you it is your work?

A. Yes; there it a little dirt on it, there.

Q. Did you exercise any degree of care in making that model?

A. Yes, I did. I tried to get them as near as possible. A sand sample is pretty hard to get from

(Testimony of Carl W. Thom.)

a blueprint accurately; that is, right on the spot. I tried to get this as perfect as possible, by hand.

Q. If Mr. Himes had testified that he had difficulty with his, you could have understood what he meant, is that right? A. Yes.

Q. I hand you plaintiffs' Exhibit "E" and ask if that has [120] any similarity to anything you have ever seen?

A. Yes. That is the Parks patent.

Q. Would you hold it up with the bottom to the jury and show them how it operates?

A. Do you want me to snap it; you don't want me to close it?

Q. Yes, you may.

A. (Witness demonstrates.)

Q. Will you show with the model which is sitting before you?

A. (Defendant's Exhibit "13"—witness holding it up for the jury to see.)

Mr. Mellin: Is that in evidence?

Mr. Smith: We will offer it in evidence, your Honor.

Mr. Mellin: If your Honor please, may I reserve the motion to strike until after the jury has received this testimony?

The Court: You may reserve the right. Proceed.

Q. (By Mr. Smith): Will you hold up the Parks box as you did and close the bottom, please?

A. (Witness demonstrates.)

(Testimony of Carl W. Thom.)

(Exhibit "13" of defendant received in evidence.) [121]

Q. (By Mr. Smith): Will you show the jury the interior of Plaintiff's Exhibit "E"; will you put them alongside so if there are any similarities they will be apparent?

A. (Witness demonstrates.)

Q. As a box maker, Mr. Thom, can you see any real differences between the structure of Exhibit "E" and Defendant's Exhibit "13"?

A. There is very little difference. They are very similar. They both answer the same purpose. As a matter of fact, there is very little difference in the two boxes.

Q. Well, let's point out the similarities that you see. Just start out and name anything that you see, anything that comes to your mind?

A. Well, they both have the overlapping flap with the inter-locking device and although they are a little different shape they are exactly the same in that respect—the overlapping tab over the top.

Q. You have mentioned differences in shape; what are those differences?

A. This particular one has round knobs in it and this one here has more square shape.

Q. Except for those differences you see similarity, is that correct?

A. Very much. They are similar.

Q. I notice that Exhibit "E" is a box that is longer than [122] it is wide, whereas Defendant's

(Testimony of Carl W. Thom.)

Exhibit "13" appears to be square, is that correct or is it not? A. That is right.

Q. Do you think it makes any difference whether these features incorporated in these two boxes are square or rectangular boxes?

A. I shouldn't think it would, although I didn't make any of this type—Berkowitz—this shape.

Q. Rectangular?

A. No, I didn't make a rectangular box after the Berkowitz style but I presume it could be done.

Q. You would fear to tackle the job would you?

A. No, I wouldn't be afraid of it but then I never tried it so I couldn't say that it would work.

Q. You have testified that the structure was similar; what can you say about operation?

A. Well, the operation is similar. As a matter of fact, the operation is identical because they both have to close with the same kind of an operation. They both are pushed from opposite corners to lock, and when they go down they snap into place identically, and they answer the same purpose—they can't be pushed up or they can't be pushed down.

Q. I didn't notice; did you put your hand in either of those boxes to snap the bottoms [123] down? A. No. No, it just went in itself.

Q. Would you call both of those automatic lock-bottom boxes? A. That is right.

Mr. Smith: No further questions.

(Testimony of Carl W. Thom.)

Cross-Examination

By Mr. Mellin:

Q. How closely in this model of Berkowitz did you follow the drawings?

A. Well, I don't know; in that particular box there I think that was to scale of their patent, their design.

Q. Did you use any of your experience that you gained in observing other automatic boxes in making it—you could hardly divorce that from your experience in making other automatic boxes, could you?

A. I went according to their drawing; that is all I did with this box of theirs. I didn't incorporate any of my own ideas or anything in the box.

Q. I notice that the tabs, in passing by each other, in Berkowitz, had to partly break the knobs, as you call them, before you got them by. You observe that in the box, don't you? A. Yes.

Q. In other words, you had to use a little more pressure to [124] —it didn't slide by and then snap in without first breaking?

A. No, not as easy as some of them.

Q. As a matter of fact, and I want you to give this very careful consideration—I want to show you a large drawing of Berkowitz——

Mr. Mellin: You will agree that this is an enlargement, won't you?

Mr. Smith: Yes.

Q. (By Mr. Mellin): Now, I draw a line

(Testimony of Carl W. Thom.)

through that tab and I find that the end of the knob in Berkowitz is a perfect half circle, isn't that correct? A. That is right.

Q. Now, you didn't do that in your box, did you—you made a cam action out of it, didn't you?

A. Not intentionally, no.

Q. Well, I will ask you to examine it; could you take it apart so that we could show the jury that what you actually done was to use the knowledge of the prior art in making a cam action out of it so that it would be possible to close that box automatically; observe it—are they half circles in your box?

A. Well, I would say they are. They are practically round if they would be put together.

Q. You notice your center line, don't you; aren't they as [125] a matter of fact a distorted part of a circle like a cam?

A. It could be; it could be—but it wasn't intentionally, I will tell you that.

Mr. Mellin: What I am talking about, your Honor, is that these are distorted cams rather than half circles, and I call that to the attention of the jury.

Q. (By Mr. Mellin): As a matter of fact, you did that in order to make the box automatic, didn't you? A. No, not necessarily.

Q. You didn't do it on purpose?

A. My intentions were to have it round.

Mr. Mellin: May I offer this enlargement which was just used to explain the witness' testimony?

(Testimony of Carl W. Thom.)

(Enlargement marked in evidence as Plaintiffs' Exhibit "O" for identification.)

(Exhibit "O" received in evidence.)

Q. (By Mr. Mellin): In the Berkowitz box, when it is folded, actually in the corners where the two pieces come together, there isn't any overlaps at all, is there?

A. No, there isn't on that. [126]

Q. And that is the way your model is, too, isn't it? A. Yes.

Q. So that if you had a heavy object in the box it could lower one edge from the other and would be visible from below or could leak out, wouldn't it? A. Not if it overlapped.

Q. You just testified that they don't overlap?

A. They do overlap; that is what I meant.

Q. Can you cut these to the corners and still get an overlap in that drawing?

A. I don't know just what you mean.

Q. I don't mean to confuse you, Mr. Thom; may I point it out in the model. Actually, if these are cut truly from the corners, there is no overlap in the corners, is there?

A. Not right in the corner, no.

Q. And for a considerable distance there is very little? A. That is right.

Q. So that if you put a heavy object in that only rested on one side it could open that at the corner to some degree?

A. Yes, a small degree.

(Testimony of Carl W. Thom.)

Q. Have you ever seen those Berkowitz boxes used commercially? A. No, I never have.

Q. I notice you made this one out of relatively light [127] material. Are they both about the same stock or is this heavier?

A. They are a different type of board.

Q. This is a soft board, isn't it? A. Yes.

Q. And that soft board would lend itself more to those tabs bending to get by the lock, rather than braking? A. That is right.

Mr. Mellin: That is all.

Redirect Examination

By Mr. Smith:

Q. When Mr. Mellin drew that pencil line that appears on Plaintiffs' Exhibit "O," I believe your testimony was that it produced a half circle, is that right?

A. Did I testify to that, do you mean?

Q. I believe that was your testimony, was it not?

A. Yes, that was my intention to make it that way. If it wasn't, it was just an error.

Q. Would you step over and examine the rest of the drawing, of which this is but a part, and with this ruler that Mr. Mellin has furnished and with this pencil——

Mr. Mellin: We agree, don't we, Mr. Smith, that what I produced is but a still larger view of that [128] drawing?

Mr. Smith: I merely want him to see——

Q. (By Mr. Smith): Draw a figure to the left

(Testimony of Carl W. Thom.)

of Berkowitz's exhibit in figure 12 which follows that dotted line out.

A. (Witness draws line.)

Q. And draw a line similar to the one that appears on Defendant's Exhibit "O" on the bottom half attached to the right in Berkowitz's.

A. To the right?

Q. Yes, sir.

A. (Witness draws line on exhibit.)

Q. What would you say those curves above the pencil line you have just drawn are; are they portions of two circles?

A. No, I wouldn't say they are. They don't look quite like they would be a perfect circle.

Q. Do you mean they——

A. They would be a little oblong.

Q. Unbalanced circles—compound curves, I mean?

A. Yes.

Q. If you will just hold up Defendant's Exhibit "13," the box that you have been testifying to. Do you see any difference in the end of the lugs in that Exhibit "13" and the end of the lugs in the drawing of Exhibit "12" [129] or of Plaintiffs' Exhibit "O"? A. No, there is no difference.

Q. The same curvature?

A. They are practically the same. I would say they are the same.

Q. Now, that Exhibit "13" that you have in your hand, is it or is it not based on what you learn from the drawing such as Exhibit "12" over here?

A. It is.

(Testimony of Carl W. Thom.)

Q. Did you require any outside information or teachings in order to make that model?

A. No; except following the blueprint.

Q. Plus the fact that that is your work, is it not?

A. That is right.

Recross-Examination

By Mr. Mellin:

Q. Do you work for the defendant Chadwick?

A. That is right.

Mr. Mellin: That is all. [130]

* * *

MEADE A. HYNDMAN

called as a witness at the instance and on behalf of the defendant, having been first duly sworn, was questioned and testified as follows:

Direct Examination

By Mr. Smith:

Q. Mr. Hyndman, will you state your name, please?

A. Meade Hyndman.

Q. Where is your residence?

A. Los Angeles, California.

Q. What is your business?

A. Right now?

Q. Yes, sir.

A. I am manager of the branch factory of Standard Paper Box Corporation. [131]

Q. Where? A. In Longview, Washington.

(Testimony of Meade A. Hyndman.)

Q. And the work of that organization is what?

A. Manufacturing folding paper boxes and carriers.

Q. You say a branch factory? A. Yes.

Q. Is there a main factory?

A. Los Angeles.

Q. How long have you worked at that business?

A. In my present job?

Q. Yes, sir. A. Oh, a year and a half.

Q. What did you do before that?

A. Well, I was in the folding box business off and on for many years.

Q. As an employee of a company?

A. Yes.

Q. What company, please?

A. Numerous ones; do you want me to enumerate them all?

Q. Could you mention one or two?

A. There was Acme Folding Box Company, St. Louis, Inter-State Folding Box Company in Middleton, Ohio; Gebhart Folding Box Company, Dayton, Ohio; Richardson Taylor Printing Company, Cincinnati, Ohio.

Q. Over what period of years did this type of work extend? [132]

A. Since I got out of World War I—I got out in September, 1919, and I was working in 1920 in the folding box industry. I had been in the paper industry prior to that.

Q. Have you ever engaged in business for yourself? A. Oh, yes.

(Testimony of Meade A. Hyndman.)

Q. What type of business was that?

A. Oh, manufacturing chemicals. I have been in the insurance business—my own business.

Q. Have you ever been in the paper box business as an operator or in your own right?

A. Not fully.

Q. Not fully.

A. No. I have had interests in folding paper box factories but not complete owner.

Q. Have you ever made any inventions in the folding paper box business?

A. Yes, sir; quite a few.

Q. Have you received patents upon them?

A. Yes, sir.

Q. Can you say how many?

A. Oh, half a dozen—possibly more, in the folding box industry. I have patents in other industries.

Q. Yes. And the patents that you received in the folding box industry, did they relate to any particular kind of [133] folding boxes?

A. Yes. They related to lock bottom boxes such as the Himes box; they related to what I call snap corner boxes similar to the Nolo box; they related to a box similar to the "Beers" patent style with the exception that it had patentable features over Beers patent such as a double corner of boxboard at all corners.

Q. Do you feel you have any special information with respect to the folding box business?

A. Special information?

Q. Yes.

(Testimony of Meade A. Hyndman.)

A. I have been in it a long time; I have had some special experience in it.

Q. What experiences—would you just recount them in your own words, please?

A. Well, I have worked as a common laborer in a factory from sweeping the floors to baling, to tying bundles as we formerly did a number of years ago before we packed cartons in shipping cases. I have worked on every piece of machinery in a folding box plant and most of them on the set-up in a corrugated and fiber box patent. I have made a number of changes in standard equipment in those plants that have—oh, proven beneficial or made them more efficient.

I have sold; I have managed a plant. I have done [134] about everything in a folding paper box plant.

Q. Reverting back to your patents on folding boxes, did you ever use those patents in any commercial way? A. Commercial?

Q. Yes.

A. Oh, yes. I went out and licensed people to manufacture under my patents.

Q. When was that?

A. The last three and a half years.

Q. Are you doing that now? A. No.

Q. Why not?

A. Well, in the first place, I found out that Himes claims I was infringing, and that forced me into really going to town and making searches to find out if I was, because under no circumstances

(Testimony of Meade A. Hyndman.)

did I want to infringe on any one, much less Ross Himes because Ross was the first one to commercially get up boxes of the lock bottom construction and the snap corner construction, and he did an excellent job—a lot of hard work, a lot of time, a lot of effort and a lot of money. I didn't want to infringe on him. I wasn't anxious to infringe on anyone. That wasn't my object. I thought I had something new—something entitled to the word "invention." The first thing that called it to my [135] mind was Ross's threat of suit. And then one of my prospective licensees who at the time was dealing with Ross on his licensing his patent and he wanted me to make a comparison between my patents and Himes' patents and I said one was about as good as another. He said, "Well, they are going to stop you from licensing people because they have bought—" —by they I mean Himes or Nolo Corporation—"have bought a Parks patent. Are you familiar with that?"

Q. Yes, sir?

A. They asked me that. "I have seen it, but that applies to a totally different kind of box than the one Himes and I are making now." So they pulled out a Parks patent copy and showed it to me. And I said, "Yes; that is on a tuck-in carton." The drawing was a small oblong or a small rectangular thing, and it looked to me like it was on a box as you pack flour in. Just at that minute it struck me, "Why, you stupid thing, you can make that any size, irrespective of the drawings." So I

(Testimony of Meade A. Hyndman.)

got a copy of that patent and read it over. And I said, "By golly, if Himes is going to buy that patent or has bought that patent to strengthen his own patents"—which was a logical idea—"he has really got something and I had better look into this more thoroughly." So I had a search made— [136] in fact, two searches made. And then I wrote to a number of people whom I thought were quite familiar with the different box constructions in the industry and who were friendly to me—both manufacturers and patent attorneys—and they sent me some patents that they thought applied to the Himes and the Hyndman; and when I got to studying these things I saw where I was wrong.

Q. Studying what things, Mr. Hyndman?

A. These patents—these older patents. Oh, golly, there was a bunch of them.

Q. Can you remember the names of any of them?

A. Well, I remember three outstanding ones.

Q. What are they?

A. Well, one was the one you were talking about here yesterday—this Berkowitz. The moment I saw that thing I said, "I am on the wrong boat, here."

Q. I hand you Defendant's Exhibit "4"; is that the one you are speaking about?

A. Yes, that is it. You see, that is back in '29 it was granted. I had a patent application in for something that was almost identical to this, but better, to me.

Q. You mentioned that you could remember the names of three and you mentioned Berkowitz?

(Testimony of Meade A. Hyndman.)

A. I am just going to state the outstanding ones, if you want me to. I have in my record here many others. But [137] there was a fellow in Great Britain by the name of Filmer. Oh, his went back considerably. Then one of the folding box gluing manufacturers—there are only two of them in the United States—he sent me one that was a French patent.

Q. Does the name come to you?

A. No; but I can give it to you from my records. My records are here in my bag.

Q. I hand you Defendant's Exhibit "5" and ask if that is a copy of any of the patents that you may have been testifying about?

A. This is the Filmer patent. There are two of these. One is not applicable to the lock-bottom box. That one was taken out in the United States; and this one of Filmer's was taken out in Great Britain. The British patent of Filmer is the one I refer to.

Q. Does it have a date upon it?

A. Completely accepted April 30, 1931.

Q. I hand you Defendant's Exhibit "6" and ask you if you can identify that?

A. Yes; that is the French patent.

Q. What is the name that appears upon it?

A. "M. LeBlanc."

Q. Does that have a date upon it?

A. This goes back to 1911. [138]

Q. After you had examined those three patents and possibly others, did you arrive at any conclusion with respect to this Parks patent?

(Testimony of Meade A. Hyndman.)

A. Well, I arrived at the conclusion that both the Parks and the Himes and the Hyndman had been anticipated in the art of the industry. This Berkowitz is the one that knocked me from under my hat because that is '29, and this British is '31. This 1911 French patent of LeBlanc, of course, shows the idea of two—each of the four bottom panels of a box adhered together so as to make what I called a double fish-mouth on the bottom of the box when the panels are folded inwardly.

Q. What was that word you used—double—

A. Double fish-mouth. That doesn't make good sense, but it makes sense to me.

Q. You are attempting to describe a shape or something by those words; is that right?

A. Yes—a double fish-mouth—they interlock (indicating with hands). Oh, these children's story-books are full of them.

Q. Self-erecting articles, is that what you are talking about? A. Yes.

Q. After you had studied the Berkowitz patent what was your conclusion with respect to Mr. Himes, or at least [139] this prospective licensee's views about the Parks patent?

A. Don't go too fast for me. What was that question, sir?

Q. Well, I will strike the question. Following your study of the Berkowitz patent, did you arrive at any conclusion with respect to the Parks patent?

(Testimony of Meade A. Hyndman.)

A. Yes. I thought the Berkowitz patent had everything that the Parks patent had in it—everything, everything.

Q. If that were the case, would you have felt immune with respect to the Parks patent?

A. Would I?

Q. Yes. A. Yes.

Q. Did you feel immune? A. Yes.

Q. Immune from what?

A. Immune from the Parks patent, but not immune from this prior art. Of course, the prior art had run out and the Parks hadn't.

Q. When the patent runs out, what is the effect?

A. Well, anyone can make it.

Q. Did you feel that you could make what Berkowitz showed? A. Yes.

Q. Did you? A. Did I make it? [140]

Q. Yes, sir. A. No.

Q. Why not?

A. Well, in the first place I didn't want to get tangled up in any lawsuit; in the second place I didn't want to harm any of my licensees at the time. So when Himes not only threatened to sue me but gave me notice of suit I cancelled out on all of my licensees. God, there was too many of them. I mean they threatened me from all around and I didn't have the money to fight these cases, so I just backed out as graciously as I could—just backed out, period.

Q. You used the words "cancelled out the licensees," I believe. What effect did that have upon your income, if any?

(Testimony of Meade A. Hyndman.)

A. Well, I just had none. I didn't have any.

Q. If you had felt that you had a defensible position, and had defended that position, what would have been the result, in your estimation?

A. Oh, I thought that I could beat the case as far as the Himes patents and the Parks patents were concerned by bringing out in the art what existed prior to the Himes, the Parks and the Hyndman. But what good would it have done me?

Q. Would it have done you any good? [141]

A. Well, there might have been a little personal satisfaction. You can't buy groceries on personal satisfaction, sir.

Q. After Mr. Himes gave you notice of suit, then what happened?

A. Nothing. I just didn't defend it.

Q. And the result was what?

A. They won by default.

Q. And then what happened?

A. Well, they were going to sue me for their judgment. I don't know—it didn't make much difference to me—twenty-five thousand dollars three times; I think that was the amount stated, and attorney's costs and this, that and the other thing. They were going to sue me for that amount—well, I had only one thing that I could do. I could go through bankruptcy. You can't get blood out of a stone. So then they said they would take my patents—the patents I had used for licensing. "All right; give you satisfaction in full for all judgment rendered—that is all right." The patent is no good

(Testimony of Meade A. Hyndman.)

to me. I am not going out and licensing on them—not with what I know.

Q. So you satisfied your judgment by assigning your patents to them, did you? [142]

A. Oh, yes—got full satisfaction.

Q. By “them,” who do you mean?

A. NoloX Corporation of America, which is Ross and his father.

Q. What particular things did you find in the Berkowitz patent that gave you a feeling of immunity with respect to the Parks patent?

A. Well, let’s start off this way: On all of these lock-bottom boxes there are four bottom panels today. They are all more or less alike. I have got one trick in mine, and you have got one trick in yours, and so forth. Two of the bottom panels—they adhere together; the other two, they adhere together. Then when these are pushed up inside of the box and the box is glued together with a glue flap—

Q. Just a moment, Mr. Hyndman. This is Defendant’s Exhibit “1.” Can you tell us what you mean by—

A. Well, here’s your four bottom panels (indicating). Now, two of them—these two are adhered together (indicating).

Q. Can you show us what you mean by that?

A. When I said adhered together, this is stuck to this when this goes over. All right. You have got the same thing—exactly the same thing over here (indicating). Now, when your boxes—when

(Testimony of Meade A. Hyndman.)

they are folded [143] over this way, then this glue seam is adhered together and you have got a box. When you push them, the darned squares squares up on the bottom.

Today, since people have got lock-bottom conscious—and Ross was the first one in the United States that ever made anyone lock-bottom conscious, including me—they always go into the four bottom panels with two of them adhering together. Now prior to that, they had other methods of making lock-bottom boxes that didn't require four bottom panels. Say these are cut off—they had two of them. But these darn things were folded in such a way that they would come over here and be glued and they created that bellows—that gusset—that fish-mouth. And Berkowitz is one of them. They all function alike.

All right. Pardon me for digressing. I could see in the Berkowitz everything that was in the Parks. I could see these panels with the exception that instead of four of them—as later date inventors have used—it had two of them, but was utilizing them in the same way as four. I saw the interlocking lugs that when you set the darn box up once it locks and you couldn't knock it down without unlocking the interlocking lugs.

Q. You just testified that instead of using four bottom panels they used two that operated in the same way? [144]

A. Yes.

Q. Can you show us on this enlarged Berkowitz drawing what you are talking about?

(Testimony of Meade A. Hyndman.)

A. Yes (witness approaches easel and diagrams of Berkowitz and Parks patents).

Q. Can you stand so the jury can see what you are talking about?

A. Irrespective of the size of or shape of the box we have four bottom panels. Especially since this Parks patent was issued and, oh, within the last ten years everybody all over the country—a lot of them got the idea of making a lock-bottom box. They all used four bottom panels. Now in this Berkowitz they have not used four bottom panels, but just two; but they have been folded in such a way that they cover—this one will cover this panel and this one will cover this panel (indicating). You get the cover arrangement for these two blank panels and it functions exactly the same as the four bottom panels. You can get that gusset in a dozen ways. Himes has four or five of them; I have two of them. I know of many others.

Q. You mentioned interlocking. Can you show what you meant by that?

A. An interlocking lug is something that when you take this flat box after it is all glued together and you give it [145] a push to erect it or set it up, an interlocking lug is something that is in there that keeps that box from collapsing of its own accord.

Q. Is there such a lug in the Berkowitz drawing?

A. Yes, you have got one here. This acts as your overlap, and here is your interlocking lug.

Q. Is there just one?

(Testimony of Meade A. Hyndman.)

A. No; there is never one.

Q. Why not?

A. Well, they have got to interlock—something has to interlock with the other.

Q. Can you say offhand, Mr. Hyndman, how many folding box manufacturers are there in the United States?

A. Oh, I would make a guess—close; four hundred and seventy-three, large and small. I am not off twenty.

Q. Do all of those people make lock-bottom boxes? A. Oh, no.

Q. How many of them would you say do?

A. Well, I wouldn't know that; but there are ones that are making Himes lock-bottom boxes; there were the ones that were making the Hyndman lock-bottom box; and there are others making lock-bottom boxes that are variations of, generally, this British Filmer patent; because a gluing machine manufacturer came out in his catalogue of gluers, which are full of pictures and specifications [146] and so forth, and brought out this fact that the Filmer British patent on a lock-bottom box could be made on his machine; and if it was made in a certain way with a certain variation of the drawings and specifications as shown on the Filmer British patent, it intimated that people were perfectly safe in making it; it was public domain.

And a lot of the bigger boys made it. If you would go around and talk to them about a license they would show them to you—"Here, Hyndman,

(Testimony of Meade A. Hyndman.)

we are making this now; what do we want a license for?" and that was some of the biggest boys in the industry. They are making that variation of the British Filmer patent, and others of their own. Gosh, some of them have got licenses on—the last few years—on a lock-bottom box.

Q. Let's stick to the questions. The next question I would like to ask you, and I think this will be my last—— A. Go ahead.

Q. Do you have any idea of how many lock-bottom boxes are manufactured annually in the United States?

A. No; no. It would be a pure guess on my part.

Mr. Mellin: If your Honor please, I don't think we ought to indulge in guesses.

The Court: No.

A. (Continuing): I can tell you one firm in one year. [147] I know what I sold.

Q. (By Mr. Smith): Would you tell us?

A. That is the Acme Folding Box Company in St. Louis, Missouri, in the first year that Ross Himes got his machine in there due to my earnest solicitation that they buy the machine, I sold nearly one hundred thousand dollars worth of them.

Q. Are you making lock-bottom boxes in this plant which you manage?

A. Oh, yes, we are making the Himes lock-bottom box under license from Nolo, which is Mr. Himes' corporation.

(Testimony of Meade A. Hyndman.)

Cross-Examination

By Mr. Mellin:

Q. As a matter of fact, your own company pays tribute in the form of royalties to this Parks patent? A. Yes.

Q. So your employers, as a matter of fact, don't agree with your opinion that the Parks patent is invalid and no good? A. Yes, they do.

Q. Now, this Acme Folding Box Company that you spoke of in St. Louis, that was also a licensee under the Parks patent; isn't that right?

A. Yes. [148]

Q. And the first time you saw a commercial box was this box brought out by the Himes Company; isn't that so—commercially, a lock-bottom box?

A. Yes.

Q. And you were very enthused about it being a great advance in the industry, weren't you?

A. Oh, yes.

Q. And you went out and sold—one hundred thousand dollars worth would be in the numbers of millions of boxes, wouldn't it? A. Yes.

Q. You said something to the jury about damages that were awarded against you—some amount like twenty-five thousand dollars; didn't you say that?

A. I don't know what was awarded against me. I know that that was what you mentioned in your notice of suit to me or to the Court.

Q. Will you tell the jury actually how much

(Testimony of Meade A. Hyndman.)

those damages were that were adjudged against you; will you tell the jury?

A. I don't remember right offhand, sir.

Q. It wasn't any sum like twenty-five thousand dollars, was it?

A. No. The final release was for—accepting a nominal sum and granting me full release for all judgment [149] rendered.

Q. Five hundred forty-two dollars and eighteen cents was the sum, was it not?

A. I don't remember that.

Q. You had a copy of the final judgment?

A. The final judgment?

Q. Yes.

A. I don't believe I ever had a copy of that.

Q. You never were that interested, were you?

A. Not much, no.

Q. As a matter of fact, it took us eight months with the detectives to serve you in that suit—you conscientiously avoided it?

A. Then you had very stupid detectives, sir, because everyone in Los Angeles in the folding box business knew where I was. My name was in the phone book.

Q. But you spent a great deal of time elsewhere than in Los Angeles, weren't you?

A. Oh, I was feverishly trying to license firms to use my box and pay me money.

Q. Exactly how many licensees did you have?

A. That I don't remember now, sir.

Q. Three? A. Three, yes, sir.

(Testimony of Meade A. Hyndman.)

Q. That was about all, wasn't it? [150]

A. No.

Q. It might have been four?

A. It might have been—or more.

Q. And one of them was this Chadwick, this present defendant, was it not? A. Yes, sir.

Q. I show you a box and I will ask you if that isn't the box that you made?

A. Yes, sir—one.

Q. I will ask you if you didn't circularize all of the Himes licensees? A. Wait a minute.

Q. I think that is your handwriting on the box, isn't it?

A. (Witness takes out glasses and puts them on.) No; no, this is not my box and it is not my handwriting. It is not my printing.

Q. Is it someone's printing you recognize?

A. No, I do not.

Q. Do you recognize the structure of the box?

A. I would recognize it better if I could have the privilege of tearing it down.

Q. Go ahead.

A. I won't destroy it. (Witness takes box apart by ungluing flaps.)

Q. Have you got that broken up? I have one here. [151]

A. All right, I will take that. This is not my box—at least I never made it. It is too poor a job of die making.

Q. How does it compare in exact formation with the boxes that you circularized the Himes licensees

(Testimony of Meade A. Hyndman.)

with in an endeavor to license them under the Himes patent, under the later Hyndman patent?

A. It is substantially the same as mine, lacking numerous essential refinements in die work. This is a box I never had any contact with—this particular sample.

Q. But it was a fact wasn't it that you did circularize the Himes licensees—each one of them?

A. Oh, now, wait; if you are trying to bring out the fact that I tried to wean Himes' licensees away from Himes and to me you are in error.

Q. I am not trying to draw that inference.

A. I never knowingly solicited one of Himes' licensees. In fact when I did so, when they got a letter of mine and they wanted to license under my patents as well as Himes', I refused to license them, telling them to stick to Himes. I have that correspondence.

Q. Do you have it with you? A. No.

Q. Isn't it a fact that you advised these prospects that you approached if they needed the Hyndman box they would be [152] free of the Parks patent? A. No.

Q. You didn't do that?

A. No, we never mentioned the Parks patent.

Q. In that suit which you mentioned you were perpetually enjoined from selling the boxes that you were making by the Court in the Southern District of California, weren't you?

A. Oh, I suppose so. Naturally you are going to get—

(Testimony of Meade A. Hyndman.)

Q. I will hand you what appears to be a copy of the judgment and ask you if that isn't a true copy of the judgment which was rendered?

A. I wouldn't know that now, sir. I don't remember having received a copy of this judgment.

Q. You remember receiving a——

A. Copy of the notice you were going to——

Q. You also remember receiving a writ of injunction don't you? A. Yes, I remember that.

Q. Yes, you recall that don't you?

A. Now, a writ of injunction; no, I don't recall that. All I remember is that I received a notice that dire things were going to happen.

Q. You also recall, don't you, an injunction against you for five hundred and sixteen dollars against you for the [153] attorneys' fees awarded in this case and damages? A. I got that.

Q. You remember that?

A. Yes, I got that.

Q. And it wasn't for any amount like twenty-five thousand dollars?

A. Well, I thought that was merely a play of words—the five hundred dollars—because in the original notice of suit it said I was to be sued for being such a bad boy for the sum of over twenty-five thousand dollars, upon which triple claim—triple damages could be asked for and attorneys' fees and Court costs.

Q. I will read you this and ask you if you don't recall it:

“That defendant Meade Hyndman, his agents,

(Testimony of Meade A. Hyndman.)

servants, employees and all of those in privity with him, are hereby directly—(reading)—selling or causing to be sold, using, or causing to be used, folding paper cartons coming within the scope of United States Letters Patent 2011232 and infringing upon and violating said Letters Patent in any manner whatsoever.”

Don't you recall receiving an injunction with words to that effect? [154]

A. No, I do not. Undoubtedly I received it but I don't recall it, no sir.

Q. Do you recall that the judgment was served on you which provided this “that plaintiffs herein shall have and recover attorneys' fees incurred by said plaintiffs in this action in the amount of five hundred dollars.” Do you recall that?

A. Well, I recall some sum.

Q. And then you recall that the costs awarded were \$42.17 and that was the total amount of the judgment; you recall that?

A. Not in detail. It was of little interest to me.

Q. Now, all of these activities of yours in connection with lock-bottom boxes that you speak of—at least, this licensing—was within the last two or three years, wasn't it?

A. Yes; three years.

Q. And your feverish activity that you related with respect to lock-bottom boxes was all subsequent to the time that you learned of the Himes box as you called it or the Parks box, and the use thereof by your employers, isn't that correct?

A. Do that over.

(Testimony of Meade A. Hyndman.)

Q. Strike the question. I will reframe it: Your activity in automatic lock-bottom boxes all commenced sometime [155] after you first saw a Parks box as made by the Acme Folding Box Company, isn't that correct?

A. My activity—let's substitute Himes box instead of Parks patent.

Q. All right.

A. I didn't know anything about the Parks patent. It is just recently I heard about the Parks patent when somebody told me Himes was going to buy it to strengthen his patents.

Q. When did you first learn about the Parks patent?

A. Oh, I first learned about the Parks patent a year and a half or two years ago—about the time—I thought about the time you fellows bought it or Himes bought it.

Q. That would be 1946 would it? A. '46?

Q. Yes.

A. No; it was later than that.

Q. Now, as a matter of fact you knew all about the Parks patent as early as 1940, didn't you; that would be eleven years ago—not a year and a half ago?

A. Not that I recall, sir. I may have seen it eleven years ago.

Q. I will refresh your memory. I show you here what is a certified copy of a patent to Meade Hyndman number 2298565. The patent was granted October 13, 1942? [156]

(Testimony of Meade A. Hyndman.)

A. And that was cited against me—Parks?

Q. Yes, that is correct. Now you recall it?

A. No, now, wait a minute—don't let's do that because I could have seen it then and still not recognized its value at the time.

Q. I see. But you would have known of it?

A. I undoubtedly knew of it if it was cited against me.

Q. In the boxes that you actually made and endeavored to license, you didn't follow the teachings of this Berkowitz patent as shown in the drawing that you testified to, did you; you didn't make them that way? A. No.

Q. Why didn't you?

A. I didn't know anything about the Berkowitz patent at that time.

Q. When did you first learn of the Berkowitz patent?

A. Shortly after this Parks patent sunk into my consciousness.

Q. Then you learned of the Berkowitz patent?

A. Then I learned of the Berkowitz patent.

Q. Then you learned of the Berkowitz patent before you started to grant these three licenses during the last three years, didn't you?

A. No; after I granted the licenses.

Q. Just exactly when did you learn of the Berkowitz patent? [157]

A. Well, I learned of the Berkowitz patent two years ago.

(Testimony of Meade A. Hyndman.)

Q. That was for the first time?

A. Well, as far as I can remember. I said I could only remember the Parks patent, here, two years ago; then you show me where I knew of it—must have known of it if it was cited against a patent application of mine—I must have known of it eleven years ago but it didn't sink into my consciousness.

Q. I see.

A. I didn't realize what it was.

Q. I don't want to misquote you; but I understood you to say when you started to think for yourself about these interlocking-bottom boxes that you looked at the Parks patent and said, "Here it is—Himes really has something good in this Parks patent." Didn't you say that? A. Yes.

Q. Then as I recall your testimony you said, "Then I made some searches and I found this Berkowitz patent." A. Yes.

Q. When was that?

A. That was two years ago.

Q. Just two years ago?

A. When the Parks patent sunk into my consciousness through Himes buying it. I said, "He is too smart to go out and buy something that is not of very definite value to him." [158] Then when this folding box manufacturer told me that it was to be purchased by Himes to strengthen his present patents, the Himes patents, then I looked up the Parks patent and got a copy of it. Then I said,

(Testimony of Meade A. Hyndman.)

“By golly, it does strengthen it.” Then and then only—I know it sounds stupid—criminally stupid to realize here is a patent on a small box like this that I had associated in my mind with tooth paste cartons and flour cartons and little cartons—tucked in on one end—to realize, you can make it any size; you can lengthen it out the same as Himes is doing with his and the same as I am doing with mine. I am stupid at times, sir. Then I looked up anything I could find. And Berkowitz was one of them that was called to my attention.

Q. As a matter of fact, the Berkowitz box made in accordance with that drawing isn’t a practical box in industry is it? A. Practical?

Q. Yes. A. Today?

Q. Yes, made according to that drawing?

A. Yes.

Q. Can you make that box in any dimensions except perfectly square? [159] A. Yes.

Q. And it will then fold flat and unfold—unlock? A. Yes.

Q. Are you absolutely certain of that?

A. I am never certain of anything, sir.

Q. What I am asking you and I would like a very definite answer for the jury. I am asking you if you follow this drawing and cut and fold the Berkowitz box as shown there, whether or not you can follow that teaching and make that box anywhere except where these walls are of equal length?

A. Wait, that is rather ambiguous. Your drawing is on a square box.

(Testimony of Meade A. Hyndman.)

Q. All right.

A. Now, do you mean can I make a box oblong——

Q. Yes.

A. ——any size, any grade of stock——

Q. Yes.

A. ——in that construction——

Q. As shown in this drawing, Exhibit “12”?

A. ——and have it function?

Q. Make it like that drawing and have it function, yes? A. Yes.

Q. Now, I am not going to go any further. I want you to be absolutely certain that that is so. I want you to [160] just say you are absolutely certain?

A. Oh, I wouldn't say I was absolutely certain my wife loved me. I hope she does but I will not be absolutely certain of anything in this world, sir.

Q. But you are sure it can be done?

A. I am almost positive—to the point where I will bet you money.

Q. Well, you can't do that in a Court but I would like to take it.

A. I am certain it can be made in an oblong square, anyway. I will make that Berkowitz box exactly like that. Now, if you will let me put that one panel on the inside of the box I will make it on high-speed automatic machinery. It is on the market today with one or two attachments which I will put on it—with the two attachments—ten dollars apiece. I will glue it at high speed today. That

(Testimony of Meade A. Hyndman.)

is more than they could do back in those days. They had no such machinery.

Q. Now, the Parks patent was purchased by Himes in 1946; is that about the time when someone told you that Himes was about to purchase the Parks patent? That is of record here. You heard it yesterday when you were sitting in the Court room.

A. I don't know. I could tell you the exact date if I had my expense account records with me. I could tell [161] you the exact date I heard it and from whom I heard it.

Q. Well, the expense account records for what company?

A. My own personal expense account records. I have kept them for many, many years for income tax purposes.

Q. Do you know of anyone who is commercially making a box as Berkowitz's?

A. No; it is unnecessary today. There are other methods of making it that are better.

Q. The Parks is one?

A. The Parks is one. The Himes is one. The Hyndman is one and the Filmer is one.

Q. Filmer is one? A. Yes.

Q. Who makes the Filmer box?

A. Nobody—only a variation of it.

Q. I see. And that variation of it came after the Parks box and those were on the market didn't it?

A. The Parks box never has been on the market.

(Testimony of Meade A. Hyndman.)

There never have been any boxes on the market commercially except Himes and Hyndman.

Q. Who put out your boxes?

A. Who put out mine?

Q. Yes; who made them commercially?

A. Mr. Chadwick made them commercially of the Coast Carton Company, for one. [162]

Q. That box that he has always made is the one on which he is being sued for infringement here, isn't it?

A. I don't know.

Q. The box right in front of you.

A. This?

Q. Yes; that is the only type of locking folding bottom he has made isn't it?

A. I don't know. Did he make this?

Q. Well, I will assure you that he did.

A. Well, this is one form of the lock-bottom boxes. You know, when it comes to—oh, shut up.

Q. To refresh your memory as to this Berkowitz box I tell you that that same certified copy of an application for the patent application you filed, on September 7, 1940, is the date, and I call your attention to the fact that both Parks and Berkowitz are referred to there; would you say in view of that that you learned of Berkowitz in 1940—and not two years ago?

A. No. I would say that I knew of it at the time this was brought to my attention, but I will say that it did not sink into my consciousness, and I might say that I never saw it because John D.

(Testimony of Meade A. Hyndman.)

Rippe was my attorney at that time and he was so much smarter than I was, that he wrote up these objections to different things cited against my patents when I was out of town. I was a [163] traveling salesman and out of town a great deal of my time and he took care of those things for me and I had supreme confidence in him.

Q. You specifically recall that that is what he did in that case?

A. No. I may have seen it, but if I did, it did not sink into my consciousness; a lot of things are discernible that are not perceptible.

Q. Mr. Hyndman, to a box man that has had the experience that you have had, you could by just merely looking at the blank in the drawing in Berkowitz, immediately recognize how it worked and the fact of its value—that it was automatic—you wouldn't need to have it sink into your consciousness would you?

A. Yes, I would. I didn't know near as much about lock-bottom boxes then as I do now. Ross Himes was the first man in the world to ever show me a lock-bottom box—the first man in the world. And then I thought, "How stupid you are,"—I mean, meaning me.

Q. Now in connection with the Parks box and the Parks patent disclosure and the Berkowitz disclosure as well as the Filmer patent you spoke of?

A. Yes, sir.

Q. Now the experts in the Patent Office had both

(Testimony of Meade A. Hyndman.)

the Berkowitz and the Filmer patents before it when they issued [164] the Parks patent and considered it; so then your position is that you disagreed with the Patent Office experts?

A. Yes, sir; I disagree with the Patent Office experts. I often have.

Q. Pardon?

A. They are rushed—there are so many of these patents in there in the office.

Q. Have you ever been in there?

A. Have I ever been in there?

Q. Yes? A. Oh, yes.

Q. You argued the Berkowitz patent and so on?

A. Oh, God forbid, no. I mean if I did you guys would make a monkey out of me quick. I do know what they are up against.

Q. Of course, it wouldn't be much of a trick to make Berkowitz's a practical box in view of the knowledge that you have at this time from your experience in the box business—the automatic box business since 1940, would it? A. No; 1920.

Q. Well, since 1920?

A. No. You would have to give me a little leeway to use my ingenuity and my skill.

Q. I see. And also you couldn't divorce from it the [165] knowledge that you have gained from all of the automatic boxes that you have seen and are presently on the market, could you?

(Question repeated by Reporter.)

(Testimony of Meade A. Hyndman.)

A. Yes, I could divorce it entirely from all I ever knew.

Q. (By Mr. Mellin): And make the Berkowitz box a practical box? A. Yes, sir.

Q. And in any shape of any relative lengths and widths so it would work?

A. Yes, sir; automatically within the scope of the machinery—the limitations of the machinery, not exactly—I am going to give you a break there—not exactly like that, because you are going to try to get me to glue over a glue flap and this thing was not glued. This thing was strung on a string there at one time on the outside of the box.

Q. Yes, but strung on a string, why—it was strung on a string so it would hold a load, wasn't it?

A. That was the only way they could hold the bloody thing together. You take those two lower edges and move them over and I will give you a better box than any box on the market today—Himes, Hyndman, Yackety-yack or Joe Blow, and I will give you a stronger box [166] without using any more stock—the minimum amount of stock. But you have got to——

Q. You have got to let yourself use the knowledge and experience you have gained all over the years, including the past years? A. No.

Q. You are not going to use that at all?

A. Not on lock-bottoms. I don't have to. If Himes had shown me that before he showed me your box, I would say throw that away.

Q. How was it that you didn't use it?

(Testimony of Meade A. Hyndman.)

A. God only knows. How is it that I didn't make it and I am supposed to be from coast to coast a pretty smart box man.

Q. When you made yours you didn't follow that one, did you?

A. I didn't know of it—although it was quoted against me. I don't know of it.

Q. Wouldn't you think that your now making a practical box would be something of the order that it is easy to discover America now that Columbus had done it?

A. No.

Mr. Mellin: Strike the question. That is [167] all.

Redirect Examination

By Mr. Smith:

Q. I believe your testimony was that your present employer is a licensee of the Nolo Company and of Mr. Himes; is that right?

A. Yes.

Q. Have you ever read the license agreement?

A. Do you mean Himes' agreement?

Q. Yes.

A. Oh, yes, four or five times with four or five copies.

Q. Does it include only the Parks patent?

Mr. Mellin: Your Honor, we will stipulate that it includes the Himes patent and the Parks patent.

The Witness: Which question do you wish me to answer, Mr. Smith?

Mr. Smith: We will strike the question.

The Witness: All right.

Q. (By Mr. Smith): Does your company, to

(Testimony of Meade A. Hyndman.)

your knowledge, pay license fees to the Himes Company?

A. Yes; sure, the Himes box is a good box.

Q. Do you have any choice in the matter of whether they do or do not pay those fees?

A. Me? [168]

Q. Yes.

A. No, I sell them. I have sold more Himes boxes in the Northwest here than were ever sold before in the history of the company, and Ross Himes is drawing a license fee on them, I hope.

Q. At the time that you learned of the apparent purchase of the Parks patent by Ross Himes, did it occur to you when you discovered Berkowitz that you might purchase it? A. Me?

Q. Yes, sir.

A. No, I don't want to purchase anything. I had all I could do to keep traveling the road, trying to peddle these licenses to other people. I had no money to purchase any.

Q. Or to defend yourself?

A. Or to defend myself.

Mr. Smith: Thank you, sir.

Mr. Mellin: No more questions.

(Witness excused.)

(Recess). [169]

(Cardboard carton marked in evidence as defendant's exhibit "14" for identification.)

Mr. Smith: I would like to call Mr. Chadwick, the defendant.

VIRGIL BLAINE CHADWICK

the defendant herein, called as witness by and on behalf of the defendant, being first duly sworn, was questioned and testified as follows:

Direct Examination

By Mr. Smith:

Q. Will you please state your name, your residence and your occupation?

A. Virgil Blaine Chadwick is my full name. My residence is at 3515 East Marion, Seattle, Washington. My present occupation is that of the owner, operator and manager of the Coast Carton Company of this city.

Q. How long have you had this present occupation?

A. I have been the owner of the company for the last—practically four years now; three and a half or four years.

Q. Prior to that what did you do?

A. Prior to that I spent a year and a half—about a year or a year and a half studying the industry, going from coast to coast, going up and down the coast, [170] visiting all of the major plants in the East and here in order to familiarize myself with this folding box industry. My stepfather who was Mr. Norrie founded this Coast Carton Company at Seattle about 47 years ago. His

(Testimony of Virgil Blaine Chadwick.)

son was killed in the Spanish War. He had no heir and he asked me to come into the box making box company with him. In order to do so I felt I had to familiarize myself with the industry because you can not step in as the owner without being familiar with the business from top to bottom. I tried to familiarize myself with every machine and process and bit of thinking connected with the industry.

Prior to that I was with the Boeing Airplane Company. I had charge of the B-29 and its construction at Wichita. I had worked up to that position from a rather humble beginning with the plant here. Prior to that I was with the General Motors Corporation in Oakland, California.

Q. Do you have any other present activities beyond those of the Coast Carton Company at this time?

A. Well, yes. I have a family to raise and I have quite an interest in my church activities. I hold rather a responsible job there and I am very, very interested in the boy scouts.

Q. It just happens that laying before you is defendant's [171] exhibit "1." Can you identify that, please?

A. That is a carton we manufacture for a firm in Tacoma.

Q. What type of a carton would you say it is?

A. It is an automatic lock bottom box.

Q. In its present form is it an automatic lock bottom box?

A. In its present form it is a pattern of an auto-

(Testimony of Virgil Blaine Chadwick.)

matic lock bottom box. After it is glued together it would become a carton.

Q. What peculiarity do you find that makes that an automatic lock bottom box?

A. Well, naturally its construction; but the point of its construction is the method of the lock engaging after it is set up in order to lock, as the wording says, to lock the bottom in place so that it can be held rigid while it is being loaded by the consumer or the customer. After the gluing operations, the box is kept flat as has been illustrated prior by the other witnesses; and then as it folds up these two locks engage on the bottom and keep it in a rigid position. These two locks here are essentially the primary factor of the box.

Q. Can you show us half of the gluing up of the bottom; what the bottom would look like then?

A. Well, in our operation we take and put it through a [172] machine that has little fingers. It has an endless belt and on this belt there is a little cam there with a finger extended flat. As it goes over a bar it raises a little wheel which bends this finger up in that fashion and that finger comes in and folds this over. At the same time as it goes through the machine it hits a rod that bends that back so in one section of the machine that happens. Then at the same time that—a step later in the machine another finger comes up and bends this over just like that. It progresses through and the glue is either placed on this panel here or this one here, depending on how the operator set the

(Testimony of Virgil Blaine Chadwick.)

machine up. And at a later point the two are folded over. When they are folded over I get this picture here in the flat pattern; and in the erected pattern we have that picture there so that we have a right angle on the bottom with a diagonal across on the corner.

Q. This tab on this defendant's exhibit "1," does it have a name in the industry?

A. Oh, depending on whether you are North, East, South or West—every area has its own vernacular—it is usually called' around here the glue tab or the diagonal tab. It is an optional name. In our particular plant we call it the glue flap. [173]

Q. Is that the tab that you say is pressed down by this bar in the machine? A. Yes.

Q. At this time would you explain with the exhibit "1" before you in what direction is it travelling as it passes through the machine?

A. We feed them in in this manner (indicating). The machine is a very long machine. It is as long as from here probably back to the second or third row of benches back there. We feed them in the machine in this manner. There are three sections of the machine. The first is called primarily the timing section. There are little lugs that come up and as they are fed through feed wheels they come to a momentary pause and then the little lugs coming along on the chains hit the box—you can set it any place as long as they are identical. They hit the box and push it through so that the next one coming along will be exactly in time to the first one.

(Testimony of Virgil Blaine Chadwick.)

That is necessary in the machine because everything is on an endless belt and everything must be timed rather precisely. The glue is applied by a circular wheel which in turn must be a time mechanism. As these come through they are hit by two time lugs, one on each side. The first section of the machine performs this operation and does [174] the two sides simultaneously. The next section of the machine these two tabs are folded forward (indicating and illustrating) then a glue wheel right between the sections applies the glue. Then the third section of the machine has two belts. You just lift this over like that (indicating) and bring these two down and there is a strip of glue on here and they just come into meeting each other at this point then they progress through weighted rollers as Mr. Himes has testified.

Q. Is that glue flap attached to one of those bottom sections ever bent down and under in your gluing operation?

A. No. It would be an impossibility.

Q. Why would it be impossible?

A. Well, the machine's construction would prevent us from doing so. Secondly, to have the apparatus come down and try to force it under in our machine, which is a straight line machine—in other words, all operations are in one straight line—it would slow the machine down. Our machine is rather a fast machine. It is one of the latest machines developed—and they cannot perform in that fashion. It must of necessity follow the buckets

(Testimony of Virgil Blaine Chadwick.)

which are designed in the machine and come up. There is no way it could be forced under in our machine. If it went down it would hit our [175] chains—it would hit our carriage belts. There is no possible way to do it, sir.

Q. The way that you have described is the only possible way on your machine?

A. That is correct, yes, sir.

Q. What kind of a machine is that?

A. It is a Staude Master Gluer put out by the Sperry Corporation of St. Paul, Minnesota.

Q. You call that a straight line machine?

A. No. The name is called the "Staude Master Gluer." They use the word "master" and kind of pat themselves on the back a little bit because it is the master of all boxes—that is the slogan—and it is a very versatile machine.

Q. The other machines on the market of which you know, what are they?

A. The International people put out a so-called "5-Z" machine which is a competitor but instead of being a straight line machine the boxes proceed part way and then are cut at right angles. That is called a right angle machine. The only other machine that I know of is the Nolox machine which is also a right angle machine.

Q. And in the right angle machine the boxes travel in one direction for a ways and then they move laterally [176] for aways, is that right?

A. That is right.

(Testimony of Virgil Blaine Chadwick.)

Q. Have you ever folded boxes such as the exhibit "1" before you two at a time?

A. To be absolutely ethical in my answer I would have to say no; this box is too large to do that. I have folded a similar box of a much smaller nature two at a time.

Q. The folding of the bottom panels in an operation two at a time is identical to this, is that right?

A. It is identical on this panel. You will have another series of flaps out here which would be accomplished in the same manner excepting that you have a set of fingers on this side and also on this side. But the operation is the same essentially for both sides of the box but operate simultaneously.

Q. Does that give you any advantage of production?

A. Not essentially. In previous testimony here quite an issue has been made about the fact that it is so much faster. But to a person who is in the practical necessity of earning their living every day by it, it is not a great advantage on our machine. We have tried it on two or three occasions. The idea looks nice but it has a very limited practical application. I believe you have an exhibit here that was offered in evidence. [177] If I can have it I would like to use it, if I may.

Q. Would this be the exhibit you are speaking about? A. Yes.

Q. This is plaintiffs' exhibit "K-1"?

A. That is fine. This machine that we have—

(Testimony of Virgil Blaine Chadwick.)

with your permission I will give a short description of it. The machine has got these chains that I told you about that act as a timing mechanism to pick this up and push it through the machine. Those chains naturally there is some limitation to what a machine can do. And in this machine the lugs are spaced thirteen inches apart. Now then, you have an operation of either fitting in within the first twelve and seven-eighths inches or jumping one notch and going to twenty-six or twenty-five and seven-eighths inches. You must have about an eighth of an inch or a quarter of an inch at the very minimum to clear the boxes. So if I have a blank that I can get within thirteen inches in the over-all pattern, then I can put them through two at a time and, when I do that, we slow our machine down approximately about—oh, a third, when we do it, because of the complexity of the double folding action occurring simultaneously. But it does give us a little increased production on a small blank that we can handle. Now then, if that blank gets over thirteen inches in [178] length, naturally I have to skip the lugs and use only every other lug, so my production immediately is cut in half. Even if the machine was running wide open the production is cut in half because I have to use every other lug. So each box presents its own particular ramifications. You have to decide in your own mind where the advantage lies—whether to take them in single form and run them through and run the machine at a fast speed or whether to skip

(Testimony of Virgil Blaine Chadwick.)

every other lug, take about a third loss on the production speed of the machine and get them in the double form. We have so far made three runs like that, trying it out, and it has not proven in our operation too practical. On a right angle machine, that is probably designed for it, it would probably have a better application. But to us it is not a particularly large advantage. Like I say, if you have got certain specifications methods—the blank is so small that it will fit within the first set of lugs you probably would have fifteen or twenty per cent advantage in your over-all production.

Q. It would not be double?

A. No, not by a long ways. We have never been able to prove that. That is the ideal and it is just a theoretical thing on paper that can't be proven.

Q. Do you know anyone who ever has approached that? [179]

A. No. I am not too familiar with all of the people in the right angle operation. Because I have bought a Staude Master, I have naturally talked to people who operate Staude Masters more than I have to the others. But nobody I have talked to has found any particular advantage in it. In fact, every time I have mentioned it to my people in the plant who are technicians in their own right, I have been pretty well talked down on it.

Q. Can you tell us briefly how you came to be manufacturing boxes according to defendant's exhibit "1"?

A. Yes. I am not sure of my dates but they

(Testimony of Virgil Blaine Chadwick.)

can be verified if requested by the Court. It was about three years ago or maybe three and a half years ago, Mr. Meade Hyndman circularized me with a letter—I say circularized me—wrote me a letter and asked me if I would be interested in an automatic box that would be operated under his patents. Every letter I get like that I write back to them, “By all means, yes; send it in.” I never know when I am going to find the gold mine that is going to make our factory grow and blossom so I answer every inventor’s letter with the reply by all means I am interested. About a week later Mr. Hyndman showed up in Seattle and came to see me and he showed me some patents that were [180] issued by the United States Patent Office. These patents gave him the right to manufacture cartons and they described methods of diagonal fold and so on. I went over them—I went over his patent, read the claims contained therein and made some samples by it. I made a production run of part of the Hyndman box. And we tried to find fault with it. Mr. Hyndman worked with me and gave me samples. He said, “Here are the variations under which you can manufacture your box.” We discussed those and he said, “These are your diemaker skill—and in fact we developed a few angles in our own plant for making this box.

It was borne in on me at a very early time that these drawings that you see are a one flat pattern drawing giving one certain style of box. It might be square, it might be oblong—any proportion you

(Testimony of Virgil Blaine Chadwick.)

may have. Whatever the artist happens to sit down and draw. Whenever you adapt the drawing on a patent to a box which is of a different size than what the patent has drawn you must of necessity read the patent and adapt the wording in the patent to the box you manufacture as well as being guided by the picture. All the picture does is guide you. It is just like a woman buys a pattern for a dress, it guides her in her thinking. If she has to make a bigger hole in the [181] armpit because she wants more freedom she digresses from the design to do so. If she wants a longer hem they digress from it. In other words, they digress from the pattern furnished to fit the particular circumstances required. We do in the box business. We follow a pattern but we digress from it as necessity requires to fit the various sizes and styles that come about. It does not mean that we have altered it or changed the basic idea. We have merely adapted it to a variation of sizes, following the same general thinking.

Mr. Meade showed me some of those variations. After he had shown them to me, I agreed to take on the license; I became a licensee and I paid him a sum of money for the privilege of manufacturing under his license. We started to manufacture. We didn't find it a bed of roses to go out and sell this box. This idea that everybody was ready to jump up in open arms for this box is not true. A lot of people have bought it. There is a lot of opposition

(Testimony of Virgil Blaine Chadwick.)

to it. Let me have a box, please, that is all glued—any box.

Q. I have here defendant's exhibit "15" which has been offered in evidence.

(Carton marked in evidence as defendant's exhibit "15" for identification.) [182]

A. Just any of them. There is a lot of opposition to this box. I mean it isn't the answer by any means. You set this box and what do you have—you have holes in here and holes along through here where dirt can seep in, where infestations can start. You have a lock on the bottom here that can and does on occasion stick up into the product; so you are limited as to some of the things that you can put into it. It isn't the complete answer. If it was I certainly would have a lot more of the industry in the Northwest buying this particular type of box. It answers a certain need and it is one of many styles we manufacture.

The box we started to sell it and we were successful in some sales. As time has progressed over the last four years we have built up some volume in it.

I think since I had the patent—I am not sure—our sales have been only somewhere around fifty thousand to sixty or seventy thousand. I think you have the figures on that. So our volume of this is only growing probably to meet a certain specific situation wherein it fits.

About two years ago—maybe not quite that long

(Testimony of Virgil Blaine Chadwick.)

ago—but approximately at that time, Mr. Hyndman wrote me a letter. And simultaneously at the same time I was served notice by the plaintiff in this case that [183] we were infringing a patent that he had there and just what was I going to do about it, that I had better stop making it. So I get all excited and I got Meade's letter and it told me he was going to have to revoke the license because of the suit. And I got all excited about it and said, "Why? The United States Patent Office issued you a patent, didn't it; do they know what they are doing; don't you know what you are doing; I paid you good money for this; what is the result here; don't I have a right to manufacture something you told me I could do?" He wrote back and told me that he had been investigating this patent—that circumstances had come up that made it evident that the patent had been anticipated and that consequently his patent was not a valid patent. And at the same time he advised me that the patent of the people who were the plaintiffs in this case was also invalid—that they had no right to sue because they had no patent that was valid because it was only based on what was known in the industry prior to the issuance of the patent and therefore, as Mr. Meade Hyndman's patent was invalid so also was the Himes' patent invalid; and that I should be free to go ahead and manufacture.

Well, to be frank to you, that looked like an awful mess to me. After all, I was just trying to [184] get along here in town and keep my factory go-

(Testimony of Virgil Blaine Chadwick.)

ing. I am not a specialist in law and I am not a specialist in patents. I have been trying to operate a factory out there. I have been at one time from janitor on up to doing the wrapping and operating the machines. So I finally have to become a patent expert I guess. I got all of these patents together. I went into them. I wrote Meade and got his opinion. I talked to other people. The last time I was in Chicago I talked to the people there. I talked to the people in Philadelphia and New York. When I came back, I came back with the thinking that Mr. Hyndman was correct; that neither his patent nor the patent issued to Mr. Himes was valid because everything they had had been anticipated at a prior time. And so I continued to manufacture the boxes, feeling I was harming no one, and doing nothing more than was my God-given right under the constitution of the United States to take those things which were in the public domain and I have continued to do that up to this trial. I believe that essentially covered my position.

Q. I have here Defendant's exhibit "14." I believe if you will examine it, having in mind the cartons of plaintiffs' exhibit "J" you will find a similarity between the carton of "14" and the carton exhibit "J"? [185]

A. Do you mean I am supposed to open these up?

Q. Yes, you may untie them; I am sure it is quite all right.

The Witness: You know I am scared to death.

(Testimony of Virgil Blaine Chadwick.)

Can I have a drink of water? The last time I was this scared, your Honor, is when I was a missionary and I was called upon, on the street, to address an audience. That is something you don't want to get into.

Now what is it you wanted me to do here?

Q. (By Mr. Smith): Is there a carton like that in the group of ten that constitutes exhibit "J"?

A. Yes; there is one right here.

Q. Is there anything—

A. These are identical. They are marked with the Himes patent number, 2011232 which to my understanding is the Parks patent—not a Himes patent. But it is marked here a Himes patent number.

Q. The number that you read again is it this number 2011232 (indicating on chart)?

A. Yes.

Q. But the wording is what, again?

A. "Himes patent number."

Q. Do you see a similarity between the bottom construction of defendant's exhibit "14" and defendant's exhibit "15"? [186]

A. Do I see a similiarity in construction?

Q. Yes, sir.

A. Well, yes, there is a similarity.

Q. Can you show the jury what is similar?

A. Well, we both use the diagonal fold; the bottom of the box which must come in to meet. They are both glued together on these panels. They both have a locking tab, here. This area in here is iden-

(Testimony of Virgil Blaine Chadwick.)

tical to this area in here. So that as they are set up, why, they come together and lock and cannot be re-collapsed again. This one, through use in the Court here, has been torn. But they are both pretty much the same. You can see here how they come together. These two are torn.

Q. Do you see any similarity in the construction of either of those models and of either of these patents here over on the easel?

A. Well, in my opinion these cartons correspond more closely to the one on the right, here.

Q. Can you demonstrate that for the benefit of the people here? I hand you a pair of scissors. (Handing a pair of scissors to the witness.)

A. Well, both my carton and this carton on here have waste material on them. There is no question about that. Mr. Himes brought that out here yesterday.

Q. Whom? [187]

A. Mr. Himes.

Q. Yes.

A. He brought out that there is waste material in these boxes. I guess waste material might be considered like the hem on a garment. You fold it over to give appearance and strength but actually it is not required. You can just cut it off straight. If you leave it on for any utility that might be there, it is not actually of necessity to the carton. If I may mutilate this, I believe I can demonstrate some of the points, here.

Q. Yes; you can go right ahead.

(Testimony of Virgil Blaine Chadwick.)

(Witness takes scissors and cuts off the corner of a fold on the bottom of the box. Witness cuts off a second piece of the box.)

Q. (By Mr. Smith): Are those pieces you have just removed the waste material we saw yesterday?

A. Yes; they correspond more closely than that. You notice that after I have taken the piece of waste material out that it will still fold.

Mr. Mellin: May I call your attention to the fact that that box is torn?

The Witness: Yes. I called the Court's attention to the fact that it was torn before I started. It is difficult to operate with a torn piece of merchandise. [188]

Mr. Mellin: I will show you one that is already cut and will save you the trouble. Without that tear. Will you open the box and see if that will latch—oh, don't use your finger—just hold the corners—don't fudge it.

The Witness: May I ask my Counsel a question?

The Court: Well, you are here to answer questions.

The Witness: All right, sir.

A. I can take a pair of scissors and cut anything to fit—just like I can take a dress pattern and cut it to fit a person.

I have cut this pattern—as you see here mine will come in and lock because it was cut that way. He—in presenting one to be presented to me here—has deliberately cut it so it won't fit. You will see

(Testimony of Virgil Blaine Chadwick.)

where he has drawn his line so they will not fit at all. I can take this carton here and cut it and it does come in and fit perfectly because I have not taken out more than is required.

Q. (By Mr. Smith): Will you go on with your demonstration, Mr. Chadwick, please?

A. Yes. You can always cut out more than is required so it will not fit. But I am trying to put on a [189] practical demonstration.

When this carton is opened up you will notice that there are two tabs here which yesterday on my carton were removed as waste material, and here is a piece of waste material that is removed from this carton here. I am going to take that and cover that up and I want to use this piece here he has to do that with.

Mr. Mellin: If your Honor please, I would prefer that that not be done.

The Court: Very well.

Q. (By Mr. Smith): Here is another box.

A. I will save this one. It might be I can still work it with this one I already have.

Q. All right.

A. If I take this carton and cut along this line right here (cutting carton) and drop it down; and I take this one here and cut along a similar line on the opposite side of the box, (cutting on bottom edge of carton) and I take the scissors and remove this waste material from the bottom of this carton as was done yesterday. Because after all it is superfluous (cuts it off). It might contribute in

(Testimony of Virgil Blaine Chadwick.)

some respect to the carton but in the essential operation it has no bearing. I remove those two, there, (cutting again) I put the waste material aside, and when I extend the flaps down— [190] remembering that I do not have enough material here because I had to start with the box instead of starting with a blank piece of material. I do not have the material here to make my little glue flap that formerly would glue here instead of being on one piece of material. I have in effect the same pattern that you see there on that box.

Q. Could you take it over and show what you mean?

(Witness approaches easel.)

A. If I hang my carton side by side with this box we have the same flap coming down and the same locking device. We have that same thing on this side,—the same locking device coming down. It is essentially that box there. I would have to extend a little glue flap up here to rejoin this box at this point. I would have to have a glue flap over here also to extend and join it. As you see I have plenty of material here to do that. So here I have a box which is exactly like the Berkowitz box. That was cut from the plaintiffs' box without any alterations and without any adulterations.

Q. Would the same thing happen if you used your own box? A. Yes.

Q. Can you show us briefly and quickly?

(Testimony of Virgil Blaine Chadwick.)

A. This box is torn. Will there be an objection?

Q. Well, let's start with one right off of the machine, [191] (handing witness a folded box form).

A. (Witness cuts on box.) You can see I am reaching through here and trying to cut through as that one is there up on the chart, through the diagonal corners. I pull out that piece of waste material, there, because it doesn't need it. (Witness cuts a second corner of bottom flap off.) There is that piece, there. Now I have that box with those two pieces of waste material removed from them; so you can see that the locking tabs here, as in that design over there are still held intact. This part here is left on essentially as I pointed out a little while ago for dust protection, for dirt and things of that nature. There is no use throwing it away if it is going to offer a service to the customer. We can throw it away and still be within the realm of our operation under the patent; just as I can throw this piece of material away at the top. It is waste. But we leave it there so that the customer can get dust protection on the top of his carton when he closes the lid. That is the same manner this one is left on in the bottom of that carton there. As the cartons come together they will lock in the bottom, there. Do you see what I mean (indicating by setting up the carton)?

Q. Will that bottom collapse up or down in the present [192] condition?

(Testimony of Virgil Blaine Chadwick.)

A. Do you mean after it is locked together?

Q. Yes. A. No.

Q. Can you show that in any way at all before we go further?

A. Yes. This carton here will take all of the pressure I want to give it. If you have a weight I can drop a weight into it and it will hold firmly. We can push it up here and the carton will hold its own weight. It must be locked together because you have a locking tab, here, that binds and bites. I will take this one in its open position just as I did on the box there and come along the same line. (Cuts bottom edge of Nalley's Potato Chip Box with which the witness is demonstrating. Opens the box up flat.) I open it up again. This waste material can be left on there. It is not necessary. It can be left on there. But in order to demonstrate the fold line as in the Berkowitz patent we will remove it so there will be no question about it as it is waste material. And there again I have the Berkowitz box. (Indicating by folding up flat box.)

I would like to indicate here certain ramifications of the making of this box that are inherent in all [193] boxes. As I said a little while ago, there is nothing in the law and there is nothing here that says that if I see I want to make a circle bigger,—a little larger or I want to make it square,—what is to prevent me from taking my scissors here and cutting it off like that. The patent says that they will lock when they come together and I can lock it with a square tab as well as I can that one there.

(Testimony of Virgil Blaine Chadwick.)

If we want to leave more material or less material, that is all right; it is part of your die-making art. It is part of anything we do,—whether it is buying clothes or eating,—just what you are doing to the taste which you have or the situation you have in hand. I notice in these boxes here that were presented to me by the plaintiff, he has taken the liberty to violate his own patent and make round corners and change them somewhat,—why? Because it is a better procedure. This box here is a better box than the Parks patent there because he has made improvements in it. He has added the round corners to it. You notice when I push this together here,—this is his own box,—I will demonstrate it for the counsel, too. When I push it together notice how the material buckles. If you want to round these corners you would have quite a time putting them together. So in normal construction, just [194] common sense,—if you give your five-year-old child scissors, and tell him to make improvements, he will do it and make it better.

These licensees over the country have found they can make improvements on that. We do the same here. I reserve the right to use common sense and judgment. I reserve the right for my men to use common sense and judgment in adapting patterns within the basic idea to what we are trying to accomplish. [195]

* * *

Mr. Smith: I would like to introduce in evi-

(Testimony of Virgil Blaine Chadwick.)

dence Defendant's Exhibit "14." Have you any objections?

Mr. Mellin: No.

(Defendant's Exhibit "14" received in evidence.)

Mr. Smith: I would like to point out that Exhibit "15," offered for identification became torn in the process of setting it up and was in the mind of the witness not acceptable and we furnished alternatively this which the Clerk has marked "16." We would like to offer that in evidence in lieu of Exhibit "15."

The Clerk: Do you want to withdraw "15"?

Mr. Smith: We will withdraw "15."

The Court: That is satisfactory.

(Carton marked as Defendant's Exhibit "16" for identification and received in [196] evidence.)

Mr. Smith: This concludes the examination of this witness for the defendant at this time.

V. B. CHADWICK

Cross-Examination (Resumed)

By Mr. Mellin:

Q. How long have you known of automatic boxes such as we have been discussing generally here, Mr. Chadwick?

A. Oh, since shortly after I came into the box-

(Testimony of Virgil Blaine Chadwick.)

making business,—probably three and a half or four years ago.

Q. Who was your predecessor in business?

A. Mr. Jim Norrie.

Q. Do you know whether or not he had a license under the Parks patent at one time?

A. I don't think he ever did. I believe at one time he negotiated for one but couldn't meet the financial requirements and dropped it at that point.

Q. How long have you known of the various boxes we have been discussing here made by various companies such as the Acme Folding Box and the Sanitary Box Company,—I mean of the locking bottom type?

A. Oh, I ran across them my first trip to the East, three and a half or four years ago.

Q. Then you knew those boxes generally were made under [197] licenses, didn't you?

A. Yes.

Q. And when you dealt with Mr. Hyndman you weren't under any misconception that there were outstanding prior patents in connection with automatic locking boxes?

A. Will you state that again?

Q. When you started to deal with Mr. Hyndman for this license you speak of, you had no thought that there wasn't any other outstanding and older patents than his?

A. No. I accepted the patent that was presented to me at its face value,—that it was a patent issued by the Patent Office.

(Testimony of Virgil Blaine Chadwick.)

Q. But you had knowledge that there were prior patents on locking bottom boxes,—automatics?

A. I knew there were some on the market. I didn't really investigate them until Mr. Hyndman introduced the thought to me. At that time we started checking through them, yes.

Q. At that time when you started checking through them did you find this Berkowitz patent?

A. I didn't check into them at that time. As I said before I accepted the patent of Mr. Hyndman as a valid patent. I did not make any search.

Q. Did Mr. Hyndman assure you at that time that if you [198] made a box according to what he said was his patent, that it would not infringe the Parks patent?

A. I don't think that he gave me any guarantee at all. The only guarantee he gave me was one written,—on the request of my attorney,—we inserted a clause there that in the event that my suit had to be defended that he would assume the responsibility for the same,—financially.

Q. In other words, when you started in to make this box you had anticipated that you would be sued for infringement of the patent?

A. No, it is a standard clause as you know in all patents. That is nothing out of line.

Q. Did Mr. Hyndman say to you that his box as given to you would do everything the Parks box would do?

A. He never mentioned the Parks box.

Q. Did he mention the Parks patent?

(Testimony of Virgil Blaine Chadwick.)

A. No.

Q. Did you know of it at that time?

A. No, I did not.

Q. Did you make any investigation?

A. No.

Q. You don't make any boxes having a blank formed as shown in this Figure 1 of Berkowitz do you, and formed such as you cut out with the scissors this morning? [199]

A. You say I don't make them?

Q. Yes.

A. I make them but they are glued a little differently,—like this. But your question is rather an obtuse question.

Q. I beg your pardon. I am sorry.

A. Sure.

Q. I mean you don't make them like this (indicating)?

A. I make them with the solid hinged line as you have seen introduced in evidence.

Q. Yes. And with the main panels,—the main locking panels fastened onto the sides of the box rather than the ends? A. That is right.

Q. So strictly speaking you don't follow the Berkowitz patent except, as you say, in function and so on?

A. I follow the principle of the Berkowitz patent. I follow that in principle just as closely as as probably your own licensees follow your Parks patent in principle.

(Testimony of Virgil Blaine Chadwick.)

Q. Let's get it. You don't make just two single bottom flaps like this, do you?

A. No. We allow the dust flaps to remain in there.

Q. You put the locking panels on the side panels of the box,—the wide side panels? [200]

A. We have put them both ways.

Q. But the box that you,——

A. This box that is in evidence; I think that is on the bottom panel, yes.

Q. But you at no time made a box strictly like this shown here as illustrated?

A. Certainly I have made it. I testified to that.

Q. How many did you make?

A. I made enough to satisfy myself that I had a legitimate patent,—that the patent that I had here had no legitimate foundation; that is what I meant to say. If you are trying to say if I made them commercially,—no. I made enough to satisfy myself that we had legitimate grounds, there.

Q. In other words, you made sort of experimental or test ones just exactly according to Berkowitz?

A. No, not all of them were exactly according to Berkowitz. If I made them exactly according to that panel they would all be square. We made them all shapes.

Q. I mean making the bottom exactly as shown in the Berkowitz?

A. No, there is nothing there that says that I have to make them that way. I made them accord-

(Testimony of Virgil Blaine Chadwick.)

ing to that and I made them other ways, also. We have made with square tabs, we have made them with round tabs, we have [201] made them with elongated tabs,—in several ways.

Q. How about commercially?

A. I testified we made none commercially.

Q. The only ones that you made commercially are like this that we have in evidence here?

A. No. We made other styles. We have made them with the flaps on the end panels as well.

Q. How many of this type have you made, the type that is alleged to infringe, here?

A. Oh, I would have to look at my records. I am under oath here. I would have to look at my records to know.

Q. I will let you make a guess, here. Was it in excess of one million boxes? A. No.

Mr. Smith: If your Honor please, the witness under oath has before this Court an exact statement as to what he has manufactured,—in boxes and the amounts in dollars of the particular types of boxes. To test his recollection there where the boxes he has spoken about as to certain sized dimensions,—and to test his recollection of this particular box doesn't seem to me to be necessary.

Mr. Mellin: If your Honor please, I just want an answer to the one question.

The Court: There is nothing before me; [202] merely a statement of Counsel.

Q. (By Mr. Mellin): May I call your attention to a paper which you signed under oath on the 6th

(Testimony of Virgil Blaine Chadwick.)

day of January, and ask you if that refreshes your recollection as to the number of boxes you made?

A. This has nothing to do with the question you asked me.

Q. I beg your pardon. I apologize.

A. If you will repeat your other question I think I can answer it intelligently.

Q. How many boxes made substantially in accordance with the one you are charged to infringe here have you made?

A. I will answer a different question than the one you asked me.

Q. I am sorry. I didn't understand that.

A. All right. I have made probably,—it looks like one million six hundred and forty-five,—oh, probably one million eight hundred thousand in quick mathematics; but not all of them were of the kind like the sample you had in your hand.

Q. If you make a box following Berkowitz which is oblong, you must change it to some degree mustn't you,—from the drawing. I realize your argument is that you have the liberty of making changes; I am not going to disregard that. I am going to ask you to confine your answers to the drawing itself,—just for that purpose. [203] So if you make that box oblong instead of perfectly square you must make some changes in the Berkowitz structure?

A. That is not a proper question to me because obviously the answer I would have to give you is no and that is not the facts of the case. Any time

(Testimony of Virgil Blaine Chadwick.)

you change the size or dimensions of a panel in any regard, the relating members to that also are changed in relationship to it.

Q. Just for the purpose of let's say for my record and my satisfaction. I would like an answer to the question.

A. I must refuse to give an answer to that question.

Q. I asked you this: If you make a box exactly in accordance with the Berkowitz disclosure in this drawing here and instead of making all of the panels of equal dimensions you make the end panels narrower than the side panels or vice versa, you must make a change in the construction of Berkowitz? Isn't that right?

A. Certainly. If you make extensions you must make the flaps to encompass that area, certainly.

Q. And you would have to make a change in respect to where it is bent in respect to the locking patents, isn't that true?

A. Not any more than in the Parks patent.

Q. You would have to make a change in the crease line? [204]

A. Certainly. We do that in all boxes.

Q. This morning when you were demonstrating boxes which you cut up and made them as you said like Berkowitz and got them to lock, you were doing something to the bottoms and distortion other than just pressing in on the corners, weren't you?

A. No, I was not.

(Testimony of Virgil Blaine Chadwick.)

Q. So you state if you make a box strictly in accordance with the Berkowitz patent,—

A. May I qualify my last answer. In the sample you handed me I had to put my fingers on it because you had mutilated the box beyond recognition.

Q. I am asking you about the others, the ones your Counsel gave you.

A. The answer is no. I kept my hands perfectly flat.

Q. And you didn't have to distort the box?

A. No more than normally.

Q. I wonder if you would mind cutting the tabs in this one so that they conform with Berkowitz, rounded at this end and coming to a line as shown in the Berkowitz drawing?

A. I don't believe I am under the necessity for doing that. As I said before, this is not a box that is made square like the Berkowitz patent. In good die-making, good processing you would be like your own die-maker in adapting the Parks patent to a square box, he would have [205] to make the alterations to do it. I will do that to the best of my ability.

Q. Will you make the line straight, as shown in the Berkowitz patent?

A. I am incapable of doing that. All I have here is a pair of scissors and a table. I will make it to the best of my ability.

Q. If you will do that; that is all I can ask of you.

A. Certainly (cuts triangular tabs from box bot-

(Testimony of Virgil Blaine Chadwick.)

tom with scissors). This is a lot more difficult than it looks, isn't it?

Q. I know it is difficult. I am sorry to have to ask you to do it, Mr. Chadwick.

A. You know you can start out with a blueprint and design one of these boxes and start from scratch with a pattern and make allowances for the various angles and what you have to work with.

Q. Is that correct now?

A. That is pretty much right.

Mr. Mellin: May I have this box marked for identification?

(Nalley's Potato Chip box marked in evidence as Plaintiffs' Exhibit "P" for identification.)

Mr. Mellin: I would like to offer it [206] in evidence.

(Plaintiffs' Exhibit "P" received in evidence.)

Q. (By Mr. Mellin): Am I doing this correctly, Mr. Chadwick?

A. No. Put your hands down at the bottom of the box. That is more nearly right, now.

Q. It doesn't work, does it?

A. Not right now, no. (Witness reaches for box.)

Q. I prefer that you not mutilate it, Mr. Chadwick.

The Court: I will ask that you hand it to him

(Testimony of Virgil Blaine Chadwick.)

and permit him to make any demonstration he wants to.

Mr. Mellin: Yes, sir.

A. If these lines are brought forth, here, and this tab right here,—if it is allowed to be extended a little further it extends a little farther and brings itself in.

Q. (By Mr. Mellin): I am not disputing that.

A. I did this very definitely for a reason because I know what you are driving at. In this Berkowitz patent you see down there you see a round corner,—see how that is rounded?

Q. That is right.

A. And the angle from here down to there is at a very [207] elongated angle. This box here,—because it is not square, you take your angle from here and give yourself a stronger angle than you would otherwise, in no way changing the patent or the claim of the box nor the reasons that the box is made.

This box here, if it comes in with the proper pressure, locks. And I didn't have any hands on the bottom of the box.

Q. Would you unlock it for me so it won't mutilate it?

A. Certainly. You notice you can't push it in unless you apply pressure on it (collapses box)?

Q. In other words, then, maybe it will work and maybe it won't?

A. That is exactly right,—in a hand-cut sample here. If we produce it from our shops we have

(Testimony of Virgil Blaine Chadwick.)

enough pride that the things we produce work; and we can make them work.

Q. Then you say that the thing that is important is to run this line "19"?

A. I am sorry. My glasses aren't that good. May I go down to the easel?

Q. Yes, you may. Line 19 must run from that point to here?

A. Line 19—is this 21 here?

Q. Yes. [208]

A. Line 19, line 21 and line 23 all have a very definite relationship to line 16. This line here has no number—in the variations of the box. If you take this box here and expand this out there so you have a wide panel here and two short panels here, naturally the lines have got to be compensated to allow for the increased distance you have made here. That is common in the trade because no two products are the same size. You have the same situation in the products developed under the Parks patent. You have the same situation in this here. As this product increases in height these lines and this diagonal here must all compensate for the increased distances that are involved.

Q. Thank you.

(Witness resumes the witness stand.)

Mr. Mellin: That is all.

(Testimony of Virgil Blaine Chadwick.)

Redirect Examination

By Mr. Smith:

Q. As a matter of slight compensation, Mr. Chadwick, with respect to the creased line "23" which is shown here as a dotted line, do we see such a compensation possibly in Defendant's Exhibit "14"?

A. Yes. These two lines right here are definitely the same crease line, here. You see them in the same [209] relationship on the box in the same manner.

Q. Would you care to state in your estimation what the angle is between line 16 and line 23?

A. Do you mean that is the bottom line?

Q. I am asking if you know what degree that angle is.

A. We vary that degree depending on the tightness of the lock that we wish and the product that it carries. It can vary—it is usually 45. We have made them 43 degrees and 47 degrees depending on the type of lock that we are involved in—whether we want a slip lock here or whether we want a lock that is forced in because it is going to carry additional weight.

Q. Within a degree or two, can you estimate what the angle is of this creased line to the bottom of the panel to which it is attached?

A. Well, it looks like this one here was made of—of course, this isn't my box and it is just con-

(Testimony of Virgil Blaine Chadwick.)

jecture on my part because I haven't got a protractor. But it looks to me like it is a 45° angle in order to bring a tight box. The gluing here is not perfect. When this box is brought up, do you see how much higher it is over here? When you look at the box like this it is definitely off of a 45. The intention may have been to have it at 45.

Q. It is close to a 45° angle? [210]

A. It is close to a 45.

Mr. Smith: Thank you. That is all.

Recross-Examination

By Mr. Mellin:

Q. If this fold line in Berkowitz is not approximately 45 degrees—that is this line 23D—you can't fold the box together flatwise, can you, assuming that the box is of an oblong type?

A. That is true in all boxes because when all folding boxes are made like this, any angle between must be approximately a 45° angle plus or minus a degree. That is true of the Beers style, the automatic Hyndman style, the Berkowitz, the Parks, because all boxes are essentially a flat pattern set over to a folded box. At some place along the line you have to come to a 45° angle.

Q. In all instances in the Berkowitz box this line must be a 45° angle?

A. I wouldn't say that.

Q. Within a degree or two?

(Testimony of Virgil Blaine Chadwick.)

A. I would assume that. But without definitely trying them out, I wouldn't know.

Mr. Mellin: Thank you.

Mr. Smith: You are excused, Mr. [211] Chadwick.

(Witness excused.)

Mr. Smith: Mr. West.

GEORGE WEST

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Smith:

Q. Will you state your name and your residence?

A. George West, 12752 6th N.W., Seattle.

Q. What is your occupation, Mr. West?

A. I am head of all of the gluing and folding at Coast Carton—the finishing department.

Q. That is what you call the finishing department. How long have you been the head of that department? A. Two and one-half years.

Q. Prior to that time what did you do?

A. I was installation engineer, erector and did experimental work for Staude Machinery Company.

Q. Is there any particular machine that you did experimental work upon?

A. Yes; the master gluer.

Q. We have had testimony there was a Staude

(Testimony of George West.)

Master Gluer; [212] is that what you are speaking about? A. That is right.

Q. On a Staude Master Gluer what operations are performed?

A. As a general rule it is the folding of collapsible boxes. I don't know how to be specific. It generally runs to collapsible bun trays, and generally boxes employ diagonals of 45° angles in their folds in order to collapse them and bring them out as a solid unit.

Q. What type of boxes have these 45° angles in their folding operation?

A. Automatic bun trays of Brightwood and Beers style and collapsible bottom boxes such as you have there.

Q. You are referring to Defendant's Exhibit "1," is that right? A. That is right.

Q. Would you explain to the jury what you must do to a blank as Exhibit "1" in making a folded carton of it?

A. First, feed the box in the machine and then time it with our timing chains.

Q. In connection with feeding it, in what direction does that blank travel?

A. It can be fed in either direction.

Q. Which way do you feed it?

A. Generally this particular box, we feed it with the [213] folds to the front end.

Q. In other words, from you toward me, is that right?

(Testimony of George West.)

A. That is right. In the first section our folders come up underneath and fold as a general rule the two center flaps. That is what it would be in this case. We make this fold and at the same time push that diagonal back so that that surface is exposed so we can put glue on it. In the same section we use another set of folders to fold this. Then we go into the second section and with the third set of folders do this (indicating), and at the same time perform this operation which is the same as we did in the first section. Then we leave our time sections, put the glue on, and make the fold with the belts just the same as is done in any straight-line gluer, and that is the finished box.

Q. The last operation is what?

A. To run it through the stacker and set the glue and dry them.

Q. This is Plaintiffs' Exhibit "K-1." Will you explain to the jury what it is?

A. Well, this box is fundamentally the same as the Nalley's box that I just had here except that for reasons of production we sometimes try to fasten them together or run them through the cutter in this fashion so that [214] we can make two boxes at once. The operation which I just showed on the front edge of the box is duplicated on the rear edge at the same time and in the same section of the machine; in other words, we do both operations going through the one section of the machine. Then the second section, we duplicate these two operations, and then we apply our glue and go into the

(Testimony of George West.)

standard gluing section and fold it right over. Then we come out with the box joined together—that is, two boxes.

Q. The operation then is the doing at one time of two foldings—which have been done in this case, but singly, is that right?

A. That is right. Well, that is the capacity of the machine a good deal.

Q. Do you gain any advantage by folding it as you have folded “K-1”?

A. Well, sometimes we do and sometimes we don’t. I would say ordinarily we don’t. We gain advantage on production with machine speed, but we usually don’t get the machine speed out of it. It is slower operation when it is double.

Q. It is a slower operation when it is double?

A. Yes.

Q. Are you familiar with the Himes patent that is here in [215] suit, number 2243421?

A. Yes, I believe so in a general way.

Q. This is Defendant’s Exhibit “2,” and if you have any doubt in your mind would you refresh your memory; are you familiar with that patent?

A. Yes. I have seen this.

Q. Have you read it?

A. I have read some parts of it, yes.

Q. Do you think you comprehended what you read?

A. Well, I believe so.

Q. Are you used to looking at drawings?

A. Yes.

Q. Could you understand the drawings?

(Testimony of George West.)

A. Oh, yes.

Q. Well, let's refer to the drawings—particularly to figure 1—and in looking at that drawing I wish with Exhibit “K-1” you would show the jury what you see in figure 1?

A. In figure 1 I merely see the blank laid out.

Q. A flat blank is what you see, is that right?

A. That is right, yes.

Mr. Smith: Would you mark this as an exhibit?
(Carton marked in evidence as Defendant's Exhibit “17” for identification.) [216]

Mr. Smith: Instead of using this one that has been folded, let's use this one.

Q. (By Mr. Smith): Now, will you explain what figure 1 in the drawing shows you?

A. It shows me the flat sheet as it is, here.

Q. What does that sheet consist of?

A. Well, it consists of two boxes nicked together; it would be two boxes with a patent locking bottom nicked together.

Q. What do you mean by “nicked together”?

A. To facilitate running through the gluer and also in the cutting, these cuts that separate the two boxes are not complete. We have left little bits of stock in there to hold them together.

Q. How is that left in there?

A. On the cutting press they nick the knives so that the knife doesn't cut.

Q. In figure 2 of the drawing—I want you to look at it carefully—and will you tell us what you

(Testimony of George West.)

see there, and if possible show for the benefit of all of us on the blank that is before you?

A. The four diagonal flaps have been turned under the sheet—under the blank—in that manner (indicating by folding flaps).

Q. What tells you that they have been turned under? [217]

A. I can see them shown by a dotted line. That shows that they are underneath—that they are concealed.

Q. They are concealed from your view, then?

A. That is right.

Q. Now then, referring to figure 3, will you then tell us and demonstrate what you see in the drawing and try to show us with the model?

A. These panels have been brought up in this fashion (indicating by folding) all along this score in both boxes. The glue has been applied and it is ready for gluing. It shows the glue applied—well, they apply it not on the panel with the 45 but on the opposite.

Q. Do you see any difference in what you have just done to Exhibit “17” and what you did a few moments ago to Exhibit “K-1” in explaining how you operate the folding machine?

A. Well, the type of equipment we have doesn’t operate in that fashion.

Q. In what fashion?

A. In the fashion shown here, folding this down and then bringing these up (indicating by folding). This is all one operation, here, to bring that up

(Testimony of George West.)

and bring this back and down at the same time.

Q. What brings that flap back and down at the same time?

A. As the folder finger raises it, it passes by a diagonal [218] bar. And as it progresses through the machine, this bar gradually flattens down until it is flat with the work line—it pushes the stock down.

Q. Have you read Claim 1 of the Himes patent?

A. Yes, I have.

Q. Do you find that that teaches—what does that teach?

A. Would you mind if I just take a quick look through here?

Q. Not at all.

A. I am not too sharp on this legal part (witness reads to himself).

That merely describes the two blanks being nicked together and the method of folding, as I showed when I first had this blank—folding this under and then bringing it up in this manner.

Q. Is there some language in that claim 1 which confirms what you have just said?

A. Yes, there is.

Q. Would you care to read it out loud, please?

A. "Said method comprising folding said extensions on the lower faces of sections to which they are respectively joined, folding the respective bottom sections flat upon the upper faces of their connected walls respectively, thereby to upwardly expose the flap extensions."

(Testimony of George West.)

I skipped something here which told about the flap [219] extensions being folded down, first. But that describes this operation—"thereby to upwardly expose the flap extensions folding each extension at the end of the series upon the assembly adjacent thereto to cause said flaps extensions to engage respective cooperating areas of the adjacent assembly respectively adhering said flap extensions to said areas and adhesively hingedly connecting the free end edges of the series." That is the final fold in the gluer section.

Q. And to get from the flat condition to the finished condition, with the bottom flaps folded over, how many steps are performed according to that language? A. There would be two.

Q. Are you familiar with double blanking as it has been practiced in the box business?

A. Yes, I have seen it before.

Q. Can you tell us what is double blanking?

A. Well, to me it is a method of getting production within the limits of the machine.

Q. Does it give particular advantage of some kind?

A. It gives you some advantage in speed. You are limited by the size of your machine, by its capacity, and when the blank gets too long naturally you can't get the number of boxes per foot of machine travel. When the blank is about thirteen inches you can run two blanks [220] to the one revolution of the feed wheel; when the blank gets

(Testimony of George West.)

over that, you can only run just one blank to every twenty-six or twenty-eight inches, the feed wheel itself being thirty inches in diameter.

Q. Does that Exhibit "17" before you show us double blanking? A. Yes.

Q. Could you hold it up and point out to the jury what you mean by double blanking?

A. Well, it is actually two boxes. This box, when it is all folded up, can be torn apart by the customer and he will have two complete boxes, there, because actually these are both bottoms (indicating). His method is to rip that apart and get two complete boxes out of it. Our reason for doing it is to do it in one operation.

Q. Will you turn the model over, please, so that the white side is exposed?

A. (Witness complies.)

Q. With this red pencil, could you trace out the outline between the two boxes?

A. (Witness complies and draws on cardboard blank.)

Q. Will you hold it up? I guess we will have to ask you to lay it down again. I am pointing here to an element and ask you to mark it with the letter "A" so we can refer to it; tell us what is that part right there? [221]

A. That is the lid.

Q. That is the lid? A. Yes.

Q. And right along here is a long narrow piece; we will mark that "A-1."

A. That is the tuck.

(Testimony of George West.)

Q. What is the tuck?

A. Well, it is the front part of the lid that tucks down into the box for closing.

Q. Would you call it a "tuck flap"?

A. A tuck flap.

Q. Yes. I point to an adjoining part, here, and ask you to mark that "B." What is that element?

A. That is a dust flap. That is a term which we use for it—"dust flap." I believe it is general.

Q. And I point over here at the end to an element and ask you to mark that with the letter "C"; what is that?

A. That is also a dust flap.

Q. On what box or in connection with what box?

A. That is on this box "A"—the lid "A."

Q. The one with the lid "A"?

A. That is right.

Q. Do you find a dust flap opposite the flap "C"?

A. Yes. [222]

Q. Will you mark that with a double "C"?

A. (Witness complies.)

Q. Do you find a dust flap opposite the flap "B"?

A. Yes.

Q. Will you mark that double "B"?

A. (Witness complies.)

Q. And do you find another lid?

A. That is right there.

Q. Will you just mark that double "A"?

A. (Witness complies.)

Q. Does that also have a tuck flap?

A. Yes, it does.

Q. Will you mark that double "A-1"?

(Testimony of George West.)

A. (Witness complies.)

Q. Can you indicate that on the box that has the lid "A"—"Walls" mark them 1, 2, 3 and 4, please.

A. (Witness complies.)

Q. The box that has the double "A," will you mark the walls with the numerals 5, 6, 7 and 8, please?

A. (Witness complies.)

Q. Do you find any originality in all of the elements which you have marked with a pencil here?

A. No.

Q. How long have you known of such a structure as that?

A. I have seen that a good many times. I would say I [223] have seen that probably since I worked at Staude's—work of this type.

Q. For many years?

A. Oh, ten or twelve years.

Mr. Smith: Would you mark that as Exhibit "18," please?

(Carton marked as Defendant's Exhibit "18" for identification.)

Q. (By Mr. Smith): I am handing you Defendant's Exhibit "18" and ask you if there is any similarity between Exhibit "18" and the blank which you have just marked up, Exhibit "17"?

A. Well, the similarity that it is two boxes nicked together. It is a different type of box.

Q. Can you with our Clerk's red pencil mark a line that would indicate the differences between the two boxes?

(Testimony of George West.)

A. (Witness draws on blank, Exhibit "18.")

Q. Would you hold that up, please?

A. (Witness holds up box and exhibits same to jury.)

Q. To the right is one box and to the left is another, is that right? A. Yes.

Q. Does each box have a lid? A. Yes.

Q. Does each lid have a tuck flap? [224]

A. Yes.

Q. Are there dust flaps on each box?

A. Yes.

Q. Identical to each other? A. Yes.

Q. Without taking the time to mark all of these parts, could you assure us that you could give the same letter and numeral designation as is on Exhibit "17" on Exhibit "18"?

A. Yes. That part of the structure is identical.

Q. You say it is nicked together. Can you show the jury what you mean? Some part there might show what you are talking about.

A. Do you mean the nicking?

Q. Yes.

A. Well, the nicking is done—I see some here and some up here (indicating).

Q. I notice that at one end, here, the parts seem to be quite loose. Is that because there is no nicking?

A. That is the reason that it is loose. The nicking in this case is to hold the scrap on the box. It is to hold the box together. That is probably a little

(Testimony of George West.)

bit different function than this but that is what it is—to keep it from getting all messed up when you handle it. [225]

Q. What do you mean by the scrap?

A. That is this stock.

Q. It is thrown away?

A. Not all of the time; sometimes, yes.

Q. If it is large, you rework it, is that it?

A. Yes.

Mr. Smith: That is all.

Cross-Examination

By Mr. Mellin:

Q. Mr. West, with respect to the blank that you have just been speaking of, the green one, that is 2 single boxes, isn't it? A. Yes, it is.

Q. And for the purpose of—that is, a double die cutting them out and then when it comes out of that machine they are separated into single boxes, are they not?

A. Yes, that is what ordinarily is done.

Q. It is not a double box blank in the sense of making two boxes and gluing them and making them at the same time?

A. I would say no in this case.

Q. With respect to the folding operations you were discussing—these (indicating) as I understood you—and correct me if I am wrong—as I understand it, you say the [226] only difference—and I don't want to put any words in your mouth, I truly mean that—the difference as I understand it is

(Testimony of George West.)

that in the patent it requires that this be bent under to here and then that this be bent that way?

A. That is right. I will turn the blank over.

Q. Is this to be bent here?

A. That is right.

Q. And then this over this way?

A. That is right.

Q. The way the Staude Master Gluer does it is to bring these over at the same time and bend it like that? A. That is right.

Q. That is the only difference, is that correct? Take your time and look at the patent.

A. Well, for that specific operation.

Q. Are there any other differences; you found all of the other elements of the claim, didn't you?

A. I believe so; if you will just give me a second.

Q. Yes, go ahead; take your time, Mr. West. I want you to be certain that you are right.

A. Yes, I believe so. That is the fundamental difference.

Q. In other words—just so that I haven't misunderstood you, you say in the patent requires this to be bent on this surface and then "that a [227] way"? A. That is right.

Q. And the way the defendant does it and the Staude Master Gluer is "that a way"?

A. In one continuous operation.

Q. Sort of in one continuous operation?

A. Yes.

(Testimony of George West.)

Mr. Mellin: That is all.

Mr. Smith: You are excused.

(Witness excused.)

Mr. Smith: Mr. Orland Christensen, please.

At this time we will offer Exhibits "17" and "18" in evidence. Do you have any objection?

Mr. Mellin: No.

(Exhibits "17" and "18" received in evidence.) [228]

ORLAND S. CHRISTENSEN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Smith:

Q. Will you state your name, please?

A. Orland S. Christensen.

Q. Where do you reside, Mr. Christensen?

A. 20203 Greenwood Avenue, Seattle.

Q. What is your work?

A. I am a patent attorney.

Q. In Seattle? A. In Seattle.

Q. What qualifications do you have to say that you are a patent attorney?

A. I am a graduate engineer; I am registered to practice in the United States Patent Office. I

(Testimony of Orland S. Christensen.)

am a member of the Bar of the State of Washington and of this Court.

Q. How did you prepare yourself for that work? A. You mean——

Q. What studies did you carry out; where did you study?

A. My engineering studies were in the University of Washington, here in Seattle. Following that, I was a staff member of Radiation Laboratory, Massachusetts [229] Institute of Technology, for four and a half years, during which time I studied patent law and took the examinations to practice before the United States Patent Office and passed it. That was in 1944. I commenced studying law in the evenings while I was a member of Radiation Laboratory. Following termination of membership there, I spent a year in the United Shoe Machinery Corporation in Boston in their patent department as an associate of that department. And then practicing before the Patent Office all of that time with the United Shoe Machinery and dealing with inventions and patent matters during a major portion of my stay at Radiation Laboratory. The work there involved radar inventions primarily and related patent inventions. And that United Shoe Machinery Corporation related to shoe machinery, of course.

In 1947 I came to Seattle at the invitation of Reynolds and Beach, a firm of patent attorneys, and became associated with them. Then I finished my law training at the University of Washington

(Testimony of Orland S. Christensen.)

Law School and passed the Bar examinations in 1949 and became admitted in the same year to the Bar of this State. In the same year, also, I was admitted as a partner in the firm—full partner.

Q. I think you neglected to say that you were studying— [230] how or where you were studying law during your time at M.I.T.?

A. I studied law back in Boston, in Northern University Law School over a period of two and a half year because I was doing it on a part-time basis. I was a full-time employee during that period. But I studied full time in Seattle at the University of Washington—that is, on a few credit basis, and worked as a regular patent agent until I became admitted to the Bar, that is, with Reynolds and Beach until 1949 and since as a patent attorney.

Q. How many years would you say you have done work in the patent business, officially?

A. Since 1947 I have worked in a private practicing firm of patent attorneys. For a year with United Shoe Machinery my sole work and responsibility was in connection with patent matters, obtaining patents, filing patent applications and prosecuting them. Before that at Radiation Laboratory I was not so much engaged in practice before the patent office myself, directly, as I was associated and working with people who were. Our function was mainly to satisfy the contract between Radiation Laboratory, M.I.T., and the Office of Sci-

(Testimony of Orland S. Christensen.)

entific Research and Development, which was to disclose inventions made at Radiation [231] Laboratory to the Government for the dissemination of information as well as the Government's patent purposes. I worked hand in hand with sections of the Army and sections of the Navy patent departments in seeing that the Government's patent protection was looked after.

Q. Does your work and has your work involved consideration of matters of validity of patents?

A. Yes. Not infrequently a client would come in with a question as to the validity of a patent and we would pass upon validity.

Q. Do you pass upon questions of patentability?

A. Yes, we do that very regularly.

Q. Does the word "anticipation" mean anything to you?

A. The word anticipation refers to the question of whether a disclosure in the prior art constitutes the substance of some subject matter under examination, in the patent sense. In other words, it means that if the prior art—that is, the knowledge available to the public, let us say, before the invention in question—if that knowledge was there, then the invention in question is anticipated, and it is therefore not patentable because it is anticipated. Somebody came before and anticipated the inventor. In deciding the question of anticipation you are simply deciding whether something in the prior art done by somebody else before [232] and available is in essence the substance of what you

(Testimony of Orland S. Christensen.)

had before you upon which you are trying to decide whether there is a patentable invention.

Q. You have been, as I understand it, talking merely about a submitted idea, is that right?

A. Yes.

Q. Assume that that idea is embodied in a patent, can there be anticipation in that case?

Mr. Mellin: If your Honor please, if he is qualified now I would like to ask a question or two on voir dire.

The Court: You may do that, Mr. Mellin.

Examination on Voir Dire

By Mr. Mellin:

Q. What do you know about paper box making except what you studied for this trial?

A. I do not know a great deal, Mr. Mellin. I have had occasional matters come up in paper box making but I am not specialized in that field.

Q. What matters came up in paper box making, particularly automatic boxes or these boxes we have been talking about?

A. I will be perfectly frank. I don't remember the details of the cases involved. I do know that a couple [233] of years ago I worked with a patent application which resulted in a patent, as I recall, on a folding box. I don't remember whether it was an automatic folding box or not.

Q. Did you have any practical experience in a paper box factory?

A. No, I never have.

(Testimony of Orland S. Christensen.)

Q. Really, then, the only knowledge you have of these paper boxes is what you gained since you were retained to testify at this trial?

A. The only knowledge with respect to these particular boxes, that is true. As I say, I have had occasion—very infrequent—to deal with boxes before. [234]

* * *

Direct Examination
(Resumed)

By Mr. Smith:

Q. Mr. Christensen, are you aware of the issue in this case? A. Yes.

Q. Do you understand that the issue with respect to the Parks patent is limited to the validity of claims 2 and 5? A. Yes, I believe I do.

Q. Have you studied the Parks patent?

A. Yes, I have.

Q. Have you read it from end to end?

A. Yes.

Q. And reread it and studied it, is that what you mean? A. Yes.

Q. And you have read claim 2?

A. Yes. I have read claim 2 and studied it very carefully.

Q. And you have read claim 5? A. Yes.

Q. Have you studied it? A. Yes.

Q. Are you familiar with the history of the application that lead to that patent while it was in the Patent Office? [240] A. Yes.

(Testimony of Orland S. Christensen.)

Q. I hand you Plaintiffs' Exhibit "B" and ask you if you can tell us what that is?

A. It is a certified copy from the Patent Office of its official file wrapper and contents, pertaining to the Parks patent. This is the complete record of the Patent Office with respect to the application by Parks which ultimately resulted in the Parks patent, including the correspondence between the attorneys prosecuting the application, and the correspondence from the examiner in the Patent Office who decides upon whether or not a patent should issue, and if so what it should contain.

Q. How is a matter of a patent application gotten before an examiner?

A. The patent application is filed in the Patent Office and—depending upon its subject matter, it is assigned to one of the divisions in the Patent Office. There would be a division which would handle the box making art, and in that division it would go to an individual examiner, called the primary examiner, who would in due course study the application and pass upon it.

Q. What type of men are primary examiners?

A. Well, they vary considerably as to background and experience. Many of them are old-time government employees—civil service employees—who have made [241] a career of patent examining. On the other hand, there is the extreme to the other side—younger men who are interested in the patent profession who are getting their training in the Patent Office. Frequently they study law school

(Testimony of Orland S. Christensen.)

at George Washington University. Very often they have had engineering degrees but not necessarily so. As I say, they vary all of the way in between there. It is hard to classify them.

Q. When the application arrives before the examiner, what is normally the next important thing that takes place?

A. Well, his task is to read the application over and find out what the applicant is claiming as his invention for which he seeks a patent; and after he understands what the invention is that is claimed in the application, he next has to decide whether or not that invention is new, and secondarily whether if it is new, if it is patentable.

After he has read the application to familiarize himself with the subject matter, he conducts a search through the records of the Patent Office in order to unearth any pertinent prior art disclosures, and that search will ordinarily extend to all previous United States patents in this particular class, and usually foreign patents. It may sometimes go into other [242] publications such as trade journals and so on.

Q. When he has made that search, what does he next do?

A. After he has completed his search, his next task is to inform the applicant of his decision initially as to whether or not the claims in the application—the numbered paragraphs at the end of the specifications—distinguished from the prior

(Testimony of Orland S. Christensen.)

art in a sense which is—in the patentable sense I should say—whether each of them defines an invention over and above and beyond the prior art. Because it is his task on behalf of the people of the Government to be certain that patents are not issued for things which already in the public domain—public knowledge—and therefore it is his task to require that the inventor, the applicant, limit his claims, the language of them, so that he does not trespass upon public domain property which would be the prior art. He has to decide, and he informs the applicant as to whether the prior art constitutes an anticipation, as I defined that word, of each and every claim in that application. Does that answer the question?

Q. This Exhibit “B,” which is before you, can you show the jury how much of that constitutes this application that apparently was filed in that case?

A. Yes. In this case the application consists in nine [243] full pages of specifications—this is as filed originally in the Patent Office—and eight claims. They are expressed over five pages. It consists of appealing to the Commissioner to grant a patent, in addition, and an oath by the inventor swearing that the invention is new to the best of his knowledge and belief and he does not believe it was known before his invention and so on, and other statutory provisions of an oath. In total eighteen pages.

Q. Is there anything else?

(Testimony of Orland S. Christensen.)

A. Oh, yes, and the drawings.

Q. Would you hold up the drawing, please?

(Witness holds up drawing to show the jury.)

Q. (By Mr. Smith): Does that drawing have any similarity to Defendant's Exhibit "11"?

A. Yes. It is the same drawing. The drawing of an application is made upon Bristol board or heavy paper, and it is used ultimately in printing the patent, by a photo-lithograph process. It is transferred from the drawing as filed into the patent drawings.

Q. I believe you mentioned, after this search and this consideration had taken place, that the examiner writes a letter or calls this matter to the attention of the applicant. Do you find such a happening in that file? [244]

A. Yes. These papers are arranged chronologically. Here is the letter which is from the Patent Office. Would you like to have me state what is in there?

Q. Yes; if you would read what the subject of the letter is. It is short.

A. It is addressed to the attorneys of the applicant. At the heading of the letter there is a statement of the references relied on in this action—the action being the examiner's initial action in the case. Then by references he means citations to particular prior art. In this case they are all prior patents. One is a Cramer patent 1662698; the second is a Filmer patent, a British patent, 345682; the

(Testimony of Orland S. Christensen.)

third is Creasey patent 1679710. And the fourth is Berkowitz patent, number 1700733—all United States patents except the Filmer patent. Their dates in the order in which I named them are March 13, 1928; April 2, 1931; August 7, 1928; and February 5, 1929.

Following the listing of the prior patents relied upon by the examiner, is a statement of what the examiner—what his position is with respect to the individual claims in the application. He states that claims 1, 2, 5, 6 and 7 are rejected as being obviously fully met in Cramer; in other words, he says, in effect, that the Cramer reference—the Cramer [245] patent constitutes an anticipation in his opinion of these particular claims.

Secondly, he covers the remaining three claims—3, 4, and 8, stating that they appear to be allowable.

Q. What do you mean by allowable?

A. He means by allowable that his position at the time of this action and letter is that he finds nothing in the prior art which he is relying upon which would prevent these claims from ultimately passing—from ultimately being incorporated in the patent if and when it issues.

Q. Is he, by listing that Berkowitz patent, relying upon the teaching of Berkowitz?

Mr. Mellin: If your Honor please, I object to that—as to what the examiner was doing with it.

The Court: Sustained.

Mr. Mellin: Unless he was there.

Q. (By Mr. Smith): In connection with a re-

(Testimony of Orland S. Christensen.)

jection of the rejected claims, is the word or name "Berkowitz" used at all?

A. The name Berkowitz is cited, as I mentioned in this list, at the head of the first Patent Office letter. I do not recall that it was referred to other than that. I do not believe it was.

Q. Referred to other than where?

A. In the file wrapper. [246]

Q. There is no reference to it at all, is that right?

A. That is my recollection. I am just going through this to be sure. No, I find none. I found none, as I recall.

(Recess.)

Q. (By Mr. Smith): Mr. Christensen, in your testimony a little while ago, you mentioned it was the examiner's duty to consider from the material found in his search the question of anticipation, as to whether or not a claim is or not anticipated, is that right? A. Yes.

Q. How does he determine that question of anticipation?

A. With reference to a particular prior art disclosure, do you mean?

Q. Yes, sir; could you tell us the technique of it?

A. Well, as I say, he has studied the particular claim on which he is focusing his attention, and he knows what the elements of that claim are; that is, if it is a claim to a combination he knows what all of the elements of that claim may be. He com-

(Testimony of Orland S. Christensen.)

parens that claim with its various elements, with the disclosures in the prior art patent or publication or whatever the particular prior art may be, to see if he can find in that prior [247] art the same or equivalent elements. And if he can, then it is a clear anticipation. The extreme case is where the prior art will be a virtual picture of the thing which is being claimed. Then shading off from that there will be questions of whether or not though there will be a difference, whether that difference is significant in the patent sense—whether the difference which makes this claim now a little bit different or maybe greatly different from the prior art is a significantly patentable difference, which means, in other words, is it an invention over and above that prior art. You have to look at the entire claim, and each claim is considered separately, and you have to find whether all of the elements are present in that prior art. If they are, they belong to the public assuming that the patent has expired and everybody can use the disclosure of the patent. If it is in public knowledge then of course it is not patentable and the examiner rejects the claims as being anticipated, or the particular claim.

Q. What is prior art?

A. What is prior art? Prior art is available knowledge—what has gone before the inventor. Usually the prior art is that which is found in printed publications, patents, trade journals, professional journals and so on. [248]

(Testimony of Orland S. Christensen.)

If an inventor can show to the Patent Office that he comes—in point of time—earlier than the invention of another, we will say, whose invention is supposed to be an anticipation, there is a proceeding by which he can show that; and despite the fact that the reference or prior art referred to has an earlier date of publication than the date we will say that the applicant has filed his application, if he can show that he is earlier, then that prior art is not prior art in the sense that it would bar him from getting a patent because he is in fact the first inventor. But the list of prior art which they cite—they are prior art to the applicant if they bear a date.

The Court: This isn't pertinent to our case, is it?

The Witness: I am probably getting a little afield.

Mr. Smith: It is explanatory, your Honor.

The Court: Well, it is of no value to us in this case.

Q. (By Mr. Smith): Have you read claims 2 and 5 thoroughly and do you think you understand them? A. Of the Parks patent?

Q. Of the Parks patent, yes. [249]

A. Yes.

Q. Have you read and studied the Berkowitz patent? A. Yes, I have.

Q. Is that a copy of it that you have before you?

A. This is a copy which I have. It has been colored for convenience in following the description.

(Testimony of Orland S. Christensen.)

Q. Is this Exhibit "12" an enlargement of that drawing which you have colored?

A. Yes, it appears to be.

Q. Is there an invention recited—I beg your pardon. Is there a combination of elements recited in claim 2 and claim 5 of the Parks patent?

A. Yes. There is a combination including a number of elements in each of those claims.

Q. How many elements?

A. Would you like me to count them?

Q. Yes, sir.

A. Well, this I haven't done. It starts out and says, "A folding carton," which is an introductory statement defining what the combination is in general, "comprising a plurality of side walls." Well, right there you have an open question as to how many elements would be included; it might be four.

Q. What does the word "plurality" mean?

A. It means more than one, and there are four shown in the [250] patent, itself, on the drawing of the patent. "A plurality of side walls hingedly connected in rectangular formation." Well, that means four—I should have read it all the way through. "And a bottom wall"—which constitutes a fifth element, but it says further, "formed of two identically similar sections." Which breaks that fifth element down into two sub-elements or sections as they refer to it, and makes a total of six, "each section being composed of two elements hingedly connected," and so on. Well, each of those

(Testimony of Orland S. Christensen.)

sections then has two elements which adds two to our total which makes eight. "Hingedly connected to the lower edges of two adjacent side walls, the two elements of each section being permanently connected and being creased on a line permitting folding thereof to correspond to the folding of the associated side walls." Well, that doesn't recite additional elements but qualifies the relationship of those elements. "The bottom sections being provided with inter-engaging locking means." Now, those are additional elements which are tacked on to the bottom sections but I suppose you should say strictly that this would bring it up to ten elements.

Q. Why do you say ten?

A. Well, the bottom sections are provided with something—when somebody is provided with something it means [251] that something is added. I think here you would say that the inter-locking means are added to the bottom sections.

Q. One to each section?

A. Or they may include it. You can look at it either way. But for the purpose of the elements of the claim, I would consider that the inter-engaging locking means are separate claim elements. "Provided with inter-engaging locking means comprising on each section a lug." It explains what the means are. "A lug projecting from substantially one-half of its free margin"—that is the free margin of the bottom section, "said lugs being staggered with

(Testimony of Orland S. Christensen.)

relation to each other when said bottom wall is closed"—explains the relationship of the lugs. "The connection of said bottom elements to each other and to the side walls affording a positive means for moving the bottom sections toward position for closing said bottom wall and for engaging said locking mean." All explanatory of the relationship between the elements.

Well, did I get ten? I believe I added up to ten. Yes, we have added them up.

Q. You included the last two lugs, I believe. Then in considering whether or not that claim is anticipated, what would an examiner do? [252]

A. Well, he would take what he then considered to be the prior patent which came nearest to it, and he would compare the elements of the claim in their stated relationship with what he considered to be corresponding elements in that prior patent or other publication. [253]

* * *

Q. (By Mr. Smith): Referring to claim 5, will you tell us how many elements you find there; tell us why we can have two claims in a patent?

A. Why can we or why can't we?

Q. Yes, why can't we have one and then another?

A. Well, the purpose of the claims is to define what the patent in reality covers—what the grant of the Government to the inventor is. If a patent, for example, has one single claim—let's suppose—which claim lists certain elements—and it is very

(Testimony of Orland S. Christensen.)

specific as to what each of those elements is in the device which is shown in the patent—then that claim will define what that patent covers; specifically as the term is used in the claims that are employed.

If the inventor feels that besides having something that is valuable in that specific form of his idea, he has also a fundamental principle in his device which would have different forms beyond the form which his drawings show, and beyond the form which that one claim which I mentioned showed, then he would like to cover that principle more broadly to protect himself and thereby to extend the coverage of his patent, and so he would add another claim which would be more general maybe at one or more points in its recitation [254] of elements, so that the broad principles were covered or the relationship of certain elements were covered broadly. So it might be that any number of claims which—defining inventions in different degrees of breadth or specifcness or species it—I don't know which it is—would be included in the one patent. The purpose of it is that if it turns out that one claim is invalid, say a broad claim, because it happens to recite something so broadly that it overlaps prior art, and is met by the prior art, and the Court so holds, then the other claim might still stand because it is more specific.

Q. Very well. Will you read or count the elements of claim 5, please, as to number?

(Testimony of Orland S. Christensen.)

A. I can do it by comparison with claim 2, perhaps, more quickly. Well, claim 5 starts off and calls for a polygonal enclosure. It says, "A plural amount of side walls hingedly connected at their edges to form a polygonal enclosure." This claim differentiates from Claim 2 in that it says polygonal instead of rectangular. Well a rectangle is a special form of polygon. A polygon could be anything three sides or more. Therefore the number of elements at that point is indefinite and it is hard to say what you should assign as the number of elements to that particular phrase in the claim, in other words, how many side walls is not stated specifically. It just says polygon. [255]

Q. In each instance it is a group of elements, though, is that not right? A. Yes.

Q. In this instance, claim 5, there could be four elements to form a polygon, is that correct?

A. That is quite true.

Q. All right. Let's assume four, if you will, please?

A. All right. Assuming four—"and a bottom wall formed in a plurality of sections" and there again it does not say how many. It says "plurality which could be two or more. So if we were going to say that it was in one instance the number of sections in the drawing of the patent, it would be two to be specific, therefore a total of six elements so far. "Each section being hingedly connected at two edges to the bottom edges of the two adjacent side walls and being creased for folding on a line

(Testimony of Orland S. Christensen.)

extending across the section from a point adjacent the hinged connection between the two side walls to which said section is connected, whereby said section may be folded into planes parallel with said side walls when the carton is collapsed"—still six elements—"the free margins of said sections being formed with similarly shaped inter-locking means." Well, at this point the language is a little different than in the other claims. The other claim said "the [256] bottom sections being provided with inter-engaging locking means," and this claim says, "the free margins of said sections being formed with similarly shaped inter-locking means." I would say that I would still consider those two separate elements, and therefore I would find that that increased the total to eight, if my assumption that two bottom sections is meant in a particular case. "The free margins of said sections being formed with similarly shaped inter-locking means adapted to be inter-engaged for holding the carton in an extended position, the inter-locking means of each free margin comprising a lug extending along one-half of said margin"—well, the lug is—the recitation of a lug and its position is merely a specification of what the inter-locking means are or is, in the singular—"and adapted to overlap the unlugged half of the margin of the next section, the bottom sections being automatically moved into position for engagement of the inter-locking means when the side walls are extended to the normal

(Testimony of Orland S. Christensen.)

open position." Today I can't count very good—that is right—there should be ten. Assuming four side walls, there is four. The bottom wall, the two sections, that is six, and then if each of the sections is subdivided into two, that makes eight. Then, as I said, I considered the lugs or the inter-locking means as two more which [257] makes ten, as in Claim 2.

Q. There are ten elements?

A. I would consider it that, yes.

Q. Slight differences in the language?

A. Yes; there are some differences in the language between the claims.

Q. Which of the two would you say is the broader?

Mr. Mellin: If your Honor please, I think that is a question of law.

The Court: Overruled.

Mr. Smith: I beg your pardon?

The Witness: He said overruled.

A. Well, with reference to the statement of a polygonal enclosure as distinguished in claim 5, as compared with a rectangular enclosure in claim 2, I would say that claim 5 is broader because it would cover any device which had three sides or more in its enclosure. With reference to the bottom wall being formed of a plurality of sections in claim 5, I would say—and claim 2 by comparison, the statement is that the bottom wall is formed of two sections—I would say that claim 5 would be broader because the number of sections is not stated and

(Testimony of Orland S. Christensen.)

the claim would therefore cover any box which had a bottom, we will say, within the other parts of the claim, which had a bottom having two or more sections. [258] The “or more” part of it makes claim 5 broader than claim 2 in the coverage of the patent, as to claim 5. However, there is a little difference in the language when talking—speaking of the lug. In claim 5 it says that each lug extends along one-half of the free margin of the bottom sections; whereas in claim 2 it says “substantially one-half.” I don’t know that I can say that is a great difference and yet there is a little difference there in the wording. One-half is more specific—you would ordinarily say it was—than substantially one-half. Because substantially could be something—depending upon the case—could be somewhat different than actually an accurate one-half.

By and large I would say that claim 5 is broader than claim 2 because these other limitations seem to me to be more essential limitations.

Q. Have you read the Berkowitz patent?

A. The Berkowitz patent referred to in the examiner’s first letter—yes, I have.

Q. Have you read and studied the drawing of the Berkowitz patent? A. Yes, I have.

Q. Have you read the language of claims 2 and 5, having in view the drawing of the Berkowitz patent? [259] A. Yes.

Q. What did you find?

Mr. Mellin: If your Honor please, this goes

(Testimony of Orland S. Christensen.)

precisely to the point; on the further ground it is argument and on the fourth ground that is deciding the precise issue of the case.

The Court: It is not specific enough. "What did you find." It is too general a question. I am unable to rule on the objection. Be specific. In what respect what did you find?

Q. (By Mr. Smith): Did you find any structural similarity between what you found in the claims 2 and 5 and in the drawing of Berkowitz?

A. Yes, I did.

Q. Would you say it was substantial similarity?

Mr. Mellin: I renew my objection, your Honor. We are now having the witness argue the application of the written claims to the structure which were described which is the function of the jury.

(Last question read by Reporter.)

A. Yes. I would say there is no question in my mind but what they are virtually identical—claims 2 and 5, now, with reference to the Berkowitz disclosure.

Q. (By Mr. Smith): Have you read the Himes patent in suit? A. Yes, I have. [260]

Q. Do you have a copy of it? A. Yes.

Q. Have you studied the drawing?

A. Yes, I have.

Q. Have you examined claim 1 thereof?

A. Yes.

Q. Do you feel that you have rather a familiar-

(Testimony of Orland S. Christensen.)

ity with the structure that is described and claimed as shown? A. Claim 1 is a method claim.

Q. Yes. What is a method claim?

A. Well, a method claim is a claim permitted by the Patent Statutes in which the patent covers a process or method as distinguished from a device or substance. It is a different class of invention than an apparatus invention; and therefore the claim being to the invention would be directed to the steps of a process rather than to the elements of an apparatus—a mechanism.

Q. With reference to the Parks claims 2 and 5, are they defining a method?

A. Claims 2 and 5 of the Parks patent devise a box, an apparatus or device.

Q. It is a finished box—that is the language, is it not?

A. Yes, it is a finished box. It says a folding carton. Whereas claim 1 of the Himes patent is a method claim [261] which defines the steps of this method which they are claiming as the invention and which the patent is intended to cover.

Q. Do you find several steps recited in that claim? A. Yes, I do.

Q. Could you say how many steps?

A. Well, the first part of the claim starts out “A method of making boxes from double blanks, each cut,” and so on and so forth, “creased,” and so on—to state what the nature of the box is that the method is concerned with, but not constituting steps of the method. The steps are as follows:

(Testimony of Orland S. Christensen.)

“Said method comprising folding said extensions on the lower faces of sections to which they are respectively joined.” The word “folding” would be the first step.

Q. Would it help you to have a model such as Defendant’s Exhibit “17,” in connection with reading that (handing Exhibit “17” to witness)?

A. Well, I had better read the whole claim so we know what elements we are talking about when we recite the steps of the method.

“A method of making boxes from double blanks, each cut and creased to form two box blanks, having their box bottom forming parts at opposite sides of the double blank; each box blank being cut and creased to [262] form four hingedly-connected side and end walls”—double blanks would be up here and down here (indicating with Exhibit “17”), “connected in end-to-end series; bottom sections foldably joining the respective walls, two of the bottom sections each having a flap extension connected to an end thereof by a diagonal crease, respectively, extending toward an inner corner of said section.” These would be the bottom sections and these would be the flap extensions, and of course this would be the diagonal crease here in that case and the diagonal crease in this other section (indicating) and two more, here (indicating).

“The walls of each box blank being opposite corresponding walls of the other box blank of the double blank. Each wall and its associated section and extensions constituting a wall assembly.” Now,

(Testimony of Orland S. Christensen.)

the method: "Said method comprising folding said extensions"—which would be these extensions here, in accordance with the description and drawing and the claim language. "Folding those extensions on the lower faces of sections to which they are respectively joined." So now the first step of the process is to take this flat blank, according to the claim, and fold these extensions upon the lower faces—the lower faces being the faces of these sections to which these extensions are joined. It is done like that (indicating with Exhibit "17") [263] and then the second step is another folding step—"folding the respective bottom sections flat upon the upper faces of their connected walls, respectively." Well, these are the sections and the flaps are folded against them, and so we fold the sections against the walls to which they are adjoined—against the upper faces of those walls, in the language of the claim. "Thereby to upwardly expose the flap extensions," so you can see they are now on top of their connected sections and so they are upwardly exposed.

The third step is "folding each assembly at the end of the series upon the assembly adjacent thereto to cause said flap extensions to engage respective cooperating areas of the adjacent assembly, respectively." This is a little hard to manage, here (demonstrating with Exhibit "17").

Q. Maybe you had better read the language again.

A. I forgot to fold all of the sections against the

(Testimony of Orland S. Christensen.)

side walls, is what I did. These tabs have to be—as the claim states—folded. I will read the language. It says, “First folding the extensions on the lower faces of the sections to which they are joined and then folding the respective bottom sections flat upon the upper faces of their connected walls.” These are all bottom sections and they have to all be folded upon [264] their connected walls like this (indicating). And now we have an assembly of folded parts. “Adhering said flap extensions to said areas.” The flap extensions will be adhered to the edges of these cooperating areas of these next sections—between here and here and between here and here, and between here and here and here and here. Finally, “and adhesively hingedly connecting the free end edges of the series.” It doesn’t say how you adhesively connect, but I assume from the patent and the disclosure of the patent and from this model that you would apply adhesive between this flap and this flap and the underlying areas of the wall sections so that you would get a bound unit.

Q. With reference to the drawing in the Himes patent, figures 1, 2, 3 and 4, would you care to state how many steps appear to be shown there—going from figure 1 to figure 4?

A. Do you have a larger drawing so I can illustrate?

Q. No, I am sorry we do not.

A. Figure 1 shows the double blank initially. And the next step would be to take each of these

(Testimony of Orland S. Christensen.)

individual flap extensions—you can see it on the dotted lines here in the figure 2. Where they have been folded underneath their adjoining bottom sections—so the first step would be to fold these underneath the adjoining [265] sections. Then in figure 3, which is the next in the series, there appears to be adhesive—it is speckled on here—on the top face of the bottom sections which have all been folded over against their individual sections. In other words, between figure two and figure three all of these bottom sections are folded against the said side sections that they are connected to hingedly. With four of those bottom sections, of course, you will find adhesive speckled on the drawing on the bottom sections next to those carrying the flaps. So there is a step in there of putting adhesive on. I also see adhesive on these edges here at the left-hand end of figure 3. And then in figure 4 you can see that the sides of the blank, thus far partly folded, has been reduced to indicate further folding, and that would have been done by folding this end assembly on the right of figure 3 over and against the adjoining wall assembly and, finally, the one next to it. And then the left-hand end assembly folding it over against the adjoining assembly there. Now, this adhesive, which is number 3 at the left of figure 3, will come into place, because at that time the little glue tabs “15” will lap against it—and that is a necessary result of folding figure 3 into figure 4. Also, of course, the little flap sections “25” and “26” will lie directly [266] against these

(Testimony of Orland S. Christensen.)

patches of adhesive which have been placed on the bottom sections "21" and "20," being similarly numbered on opposite sides of the double blank.

So that the first step is to fold the flap extensions against their body sections, and then to fold the body sections—all of the body sections themselves, and put them against the flaps and apply the adhesive in the various places, naturally; and then to fold the unit so that the assembly of walls and bottom sections overlap in the manner of figure 4 so that the adhesive can form a bond between the areas which are interposed between. Figure 5 shows that the two parts of the double blank have been pulled apart.

Q. Thank you. We didn't want to go into "5"; it is unimportant.

Mr. Smith: I believe that is all, if you wish to examine.

Cross-Examination

By Mr. Mellin:

The Court: How long will your cross-examination take?

Mr. Mellin: About three minutes.

The Court: All right. [267]

Q. (By Mr. Mellin): Mr. Christensen, on this question of Berkowitz, being referred to by name and number by the examiner during the course that the Parks patent was traveling through the Patent Office, there is no question in your mind but that the patent examiner who cited it or referred to it

in that understood how the Berkowitz patent—the device shown in there, was made, from its drawing, and how it operated from its drawing and description, is there?

A. I honestly can't say that I can say that he had a complete understanding of it. He may have seen a passing similarity in the drawing of the Berkowitz patent and thought it would be pertinent to have it in the record without reading it thoroughly.

Q. Ordinarily, though, the examiners very carefully look at these patents—that is part of their job, isn't it—and analyze them?

A. That is part of their job, but sometimes the results indicate that they haven't done so.

Q. I see. But the fact it was cited would lead you to believe that he had done his job?

A. Well, the fact that it was cited would indicate, of course, that he found the patent in his search and that he noted some similarity, at the time he made his search, between the patent and the claims in this [268] particular application. But I can't say that I would deduce from that that he fully understood the Berkowitz patent necessarily, because I would just be looking into a crystal ball and wouldn't have any way of determining that.

Q. These examiners in these various divisions, they get familiar with the patents in that particular division, don't they?

A. Well, if they have been there any number of years, of course they do. They come and go very frequently, however, and it is difficult to say

(Testimony of Orland S. Christensen.)

whether the examiner who handled this particular case had been there a day or ten years.

Q. After the examiner who actually examines the case decides that it is to be finally allowed, what does he do with that application; doesn't he take that up with the Chief Examiner of the division, who has the final say?

A. Well, when an application is passed to allowance, the applicant is notified that the claims are all allowable in the application, and then——

Q. I beg your pardon. I think you did not understand my question. A. All right.

Q. When the examiner who actually makes the application and grants the objections and does the allowing, when he [269] gets through with it he goes to the Chief of the division to finally pass on it, does he not?

A. When you say finally pass on it; the Chief Examiner finally approves it.

Q. With respect to the Himes patent that you have just been referring to, is there any substantial difference between folding this little extension on the under surface of this flap first, and then putting that flap over and doing it simultaneously; is there any substantial difference in doing it the two ways?

A. Can you amplify the question? I don't know what you mean by "substantial difference."

Q. Let's see, you say—as we understood it during the trial—you said that the Himes patent calls for first bending this little extension—the Himes patent calls for putting this little extension under here first? A. Yes.

(Testimony of Orland S. Christensen.)

Q. And then doing it that way which makes it two steps? A. That is right.

Q. And you heard the testimony today by that nice Mr. West that was on the stand, when he said that the way the Staude machine did it was in one operation and not in two? A. Yes.

Q. Was there any substantial difference between the two? [270]

A. Well, as you pointed out through your questioning, I haven't had a great deal of contact with these automatic folding boxes and I haven't spent any time in box factories. But I would say whether there is a substantial difference or not depends upon just common sense; it depends upon whether or not you are doing it by machine of a certain type, we will say, or by another type—if you are doing it by machine. When you say “substantial difference,” this is a very simple thing, this little box. There are two little pieces, here.

Q. I am merely talking about whether you do the two operations in fast sequence or do them simultaneously, there is no real difference between them, is it?

A. It depends upon the whole thing as supported to begin with. I would say that I could pick these up and go like that (indicating) quite fast. If I did it this way, I would hold them between my fingers and continue to hold them and then press it down like that (indicating). Perhaps I would put it all the way up like this and then bring these back.

Q. They would all be equivalent, wouldn't they?

(Testimony of Orland S. Christensen.)

A. You end up the same way with this flap extension on the bottom section.

Q. By the way, you have been retained in this case, aren't you; you are a practicing lawyer? [271]

A. Yes, I am.

Q. And you, of course, expect to receive your usual remuneration—whatever it is in this case?

A. To compensate for my being away from my office.

Q. Is there any wording in the Himes patent which specifically requires a definite sequence in those steps?

A. Looking at the claim alone, I would say that there is, because the first step is folding the flap extensions on the lower faces of the sections to which they are joined.

Q. And the lower faces would always be the underside, wouldn't it—the one I point to would be the lower face?

A. When this is initially laid out like this, I would say from the language of the claim, that folding the flap extensions against the lower faces means the faces which are then down, because later on in the claim it says that the adjoining sections—which have these—we will assume—have these extensions on them, are folded upon the upper faces of the wall sections. Now what is an upper face on the wall section I couldn't say, because it depends on how the box sits in its ultimate position. If you attempt to refer to the word "lower" as being the lower face of the box when assembled or when in

(Testimony of Orland S. Christensen.)

blank form, we will say. In other words, [272] when it is folding these flap extensions on the lower section of the faces adjoined to them, I interpret that to mean the faces which are then lower—which are then facing downward, and I get that deduction from the claim, itself, by reading further to find that the second step or one of the next steps is to fold this unit up against what they refer to as the upper face of the side wall. If that is a side wall, it can never have an upper face if the box is used in its ordinary way because it is a vertical wall, and something which is vertical doesn't have an upper face, such as the wall of a building. Therefore, I would assume when they say folding this upon the upper face of the side wall, they mean—they necessarily mean upon the upper face as it is in the laid-out form of this blank.

Furthermore, continuing the language of the claim, they say, “thereby to upwardly expose the flap extensions”—well, the word upward is again used. The only thing I can derive from the claim is that they are talking about upper and lower in the condition of the blank during the course of the operation of folding it both ways.

Was that your question?

Mr. Mellin: No further questions. [273]

Redirect Examination

By Mr. Smith:

Q. In the Himes patent, which I believe you have before you at the present time, do you find

(Testimony of Orland S. Christensen.)

any statement of disclaimer or statement headed by the word "Disclaimer"?

A. On the last page of the patent there has been printed, under the heading "Disclaimer," a statement which starts out with the number of the patent, 2,243,431, Ross A. Himes, Piedmont, California, and then the title of the patent, "Paper Box and Method of Making the Same." Patent dated May 27, 1941; Disclaimer filed October 24, 1941, by the Assignee, who is "Nolox Company of America." Stated in this disclaimer statement, here. Then it goes on, "hereby enters this disclaimer to claims 2 and 6 in said specifications." Referring to the patent, itself. And then underneath that it says "Official Gazette, November 18, 1941," which refers to the official gazette of the United States Patent Office in which this disclaimer was published.

Q. How many disclaimers are there in the Himes patent? A. There are nine altogether.

Q. Under that word Disclaimer how many were mentioned?

A. The Disclaimer is to claims 2 and 6.

Q. Only to 2 and 6, is that right, Mr. [274] Christensen?

A. Yes; merely to claims 2 and 6.

Q. And that leaves how many in the patent?

A. That leaves seven.

Q. What is a disclaimer?

A. A disclaimer is an act by the owner of the patent authorized by the patent statutes to enable the patent holder to, in effect, remove from his

(Testimony of Orland S. Christensen.)

patent those claims which should not have been in there in the first place. Maybe I should qualify that—the wording is not too well stated. The statutes authorized the disclaimer of parts of the claims or any number of claims or any parts of any claims when it appears to the patent holder that those claims are invalid.

Q. Have you finished?

A. I believe so, unless you wish to have me amplify it.

Mr. Smith: That will be all.

Mr. Mellin: That is all. [275]

* * *

ROSS A. HIMES

previously sworn, recalled to the stand as an adverse witness.

Direct Examination

By Mr. Smith:

Q. Mr. Himes, I am handing you Defendant's Exhibit "2," which is the Himes patent in suit, and I would like you to refer to claim 1 thereof and I would ask if you would explain in your own terms again in the latter part of the claim following the words "a method comprising," how many steps are described as we go along, in reading the language; if you would read the language and we will count the steps as we go along.

A. This is the first time I have done this, Mr. Smith. I hope that I can read the steps or count the steps as you have asked me to. [276]

(Testimony of Ross A. Himes.)

“Said method comprising folding said extensions on the lower faces of sections to which they are respectively joined.” That would be one step, wouldn’t it?

Q. One step.

A. Yes. “Folding the respective bottom sections flat upon the upper faces of their connected walls respectively, thereby to upwardly expose the flap extensions”—that would be two steps, wouldn’t it?

Q. Two steps.

A. “Folding each assembly at the ends of the series upon the assembly adjacent thereto, to cause said flap extensions to engage respective cooperating areas of the adjacent assembly respectively.”

Q. I would say that is three steps; is that right?

A. Three, yes.

Q. That is bringing the ends in; is that right?

A. It seems that that would be three, yes. “Adhering said areas”—that would be four—“and adhesively hingedly connecting the free end edges of the series.”

Q. Five.

A. That would be five steps with a question—that perhaps the last two—not perhaps the last two, but surely the last two would be accomplished at the same time, simultaneously.

Q. The last two might be accomplished at the same time, is [277] this what you say?

A. They would on any machine that I know of, yes.

Q. There are two things happening at the same

(Testimony of Ross A. Himes.)

time; that is what you are really saying, isn't it?

A. Well, yes—approximately simultaneously.

Q. That is all with respect to that. Now this is Plaintiffs' Exhibit "A," a copy of the Parks patent; I am sure you have read that, haven't you, sir?

A. The Parks patent?

Q. Yes. A. Yes, sir.

Q. I would like you to refer to claim 2. Would it be easier for you to read it if it was black on white?

A. I was going to ask for a soft copy. Without my bifocals this is a little bit difficult and I don't have them with me.

Q. These are identical, are they not—as far as you can see right now?

A. Well, I assume so. [278]

* * *

Q. (By Mr. Smith): With your permission I would like to point out the elements that we find in the Berkowitz patent. You may direct. We will count them as we go along.

A. Are you going to point them out as I read, Mr. Smith?

Q. Would you point them out and let me read them? A. I would much rather sit here.

Q. All right. I will point them out for you.

A. Are you ready?

Q. Yes, sir.

A. Claim 2: "A folding carton comprising a plurality." [279]

(Testimony of Ross A. Himes.)

Q. This Berkowitz does show a folding patent, does it not?

A. Yes. "Comprising a plurality of side walls."

Q. Is this the plurality, these elements A, B, C, D, in capital letters? A. Yes.

Q. Are there four?

A. Four is the plurality, yes; "connected in rectangular formation."

Q. Do you agree that in the box they would be in rectangular formation if these four walls are connected?

A. Is a square a rectangle, Mr. Smith?

Q. I believe it is.

A. I am asking you. I don't know.

Q. I think it is.

A. Then it is a rectangle. "And a bottom wall formed of two identically similar sections."

Q. Can we say that in figure 6 we see a bottom wall, here (indicating), can you see from there?

A. Yes.

Q. Is that a bottom wall?

A. That is a bottom wall.

Q. Are these the two sections here and here marked with the letters "E" and "B"—is that right? A. Yes.

Q. And they are identically similar? [280]

A. To all practical purposes they are identical, yes.

Q. And that makes two more elements, or six, does it not? A. I haven't counted them.

Q. Well, let's go back. 1, 2, 3, 4—and one bottom half element here and one here—is that right?

(Testimony of Ross A. Himes.)

A. That adds up to six, yes. "Each section being composed of two elements."

Q. Now we are talking about this or this, are we not?

A. "Each section being composed of two elements."

Q. May we call this element on the lower side of the dotted line 23 one element and that above another element?

A. That would be questionable with me. Elements to me mean separate parts. To me I always see two parts on that box.

Q. Well, let's read the rest of the phrase and then maybe we will understand it.

A. "Each section composed of two elements hingedly connected to lower edges of two adjacent side walls."

Q. All right. Now, "hingedly connected" first. Is that dotted line there a hinged connection?

A. That is a creased line which acts as a hinge.

Q. Thank you. Now we have to this moment six elements, and each of these are divided into two—or do you deny that? [281]

A. I would be inclined to deny that particular reading, so far as my own analysis of this claim is concerned. We have said here—going back—"each section being composed of two elements hingedly connected to lower edges of two adjacent side walls." Now, there is a question there.

Q. We will cover that.

(Testimony of Ross A. Himes.)

Mr. Mellin: Mr. Smith, will you let the witness complete his answer?

A. Perhaps I am stuck with an opinion, Mr. Smith. But to me elements in the box art mean separate parts which may be connected or be separate. However, I will read your claim for you.

Q. (By Mr. Smith): All right. Then at the moment it is argumentative whether we have added an extra two elements, bringing it up to six?

A. To me it is argumentative.

Q. However, we do have a creased line 23, which you say acts as a hinge? A. That is right.

Q. Lying between a part above the crease line and something below the crease line?

A. Yes, sir.

Q. All right.

A. "Each section being composed of two elements hingedly [282] connected to the lower edges of two adjacent side walls." That completes that portion.

Q. That part of the bottom section, little letter "d" in figure 1 of this Berkowitz drawing, above the creased line, is connected to the part capital letter "D," is it not? A. That is.

Q. And in the completed box as appears elsewhere in the drawing, the part below the creased line 23 is connected to the wall "A," is it not?

A. In the completed box, but not in the blank.

Q. We are not talking about the blank.

A. That is where the point of argument comes in.

Q. Yes. But the patent claim that you read we agreed called for a box?

(Testimony of Ross A. Himes.)

A. All right, sir. Do you want me to repeat that?

Q. No; I think that that was explanatory and not counting another element.

A. "The two elements of each section being permanently connected."

Q. It is argumentative at the moment whether or not above or below the line 23 is two elements, but whatever they are they are permanently connected, are they not?

A. Yes. They have never been separated.

Q. Does the claim say that they should have been separated? [283]

A. No. It says that they are permanently connected.

Q. All right.

A. "And being creased on a line, permitting folding thereof to correspond to the folding of the associated side walls."

Q. Now, that line permitting the folding thereof, is that the line 23?

A. Yes—if you are pointing to 23. I can't see it from here.

Q. I assure you that I am.

A. It is the diagonal creased line.

Q. It is that diagonal creased line right there (indicating), and that permits the parts to come up inside, in the center?

A. That is right.

Q. Thank you.

A. "The bottom sections being provided with inter-engaging locking means."

(Testimony of Ross A. Himes.)

Q. Are those the lugs 21 and 21B?

A. Yes.

Q. Two more elements—at the moment it is argumentative whether or not we have ten, but at least we have two more at that point, do we not?

A. Yes. I hope you are counting them, Mr. Smith. I can't do that and read the claim at the same time. [284]

Q. All right; yes.

A. "Comprising on each section a lug."

Q. Is 21D a lug? A. 21D is a lug.

Q. Thank you, sir.

A. "Projecting from substantially one-half of its free margin."

Q. Let's clear up the words "free margin" for a moment. Is there a free margin on Berkowitz figure 1?

A. Well, a free margin in a box of that construction in box makers' parlance would be the margin that is not connected to anything else; therefore it is free, so it would no doubt include the entire edge.

Q. Between the corners of the box, is that right, as in Parks figure from that corner to the diagonally opposite corner; is that what you are talking about?

A. Oh, no, not in Parks. We are speaking about Berkowitz now.

Q. Parks is your patent, and I think that the language comes from there—so that we can understand it—could you show it with a box model,

(Testimony of Ross A. Himes.)

maybe, such as Plaintiffs' Exhibit "G" (handing exhibit to the witness)?

A. In this model the free margin—was that the term——

Q. Yes. [285]

A. ——would be all of this (indicating).

Q. From approximately one corner to the diagonally opposite corner of the box; is that right?

A. Yes, that is right.

Q. And that is the free margin of the bottom section?

A. That is the free margin of the bottom section.

Q. Going back, just read that last phrase that included the words "free margin," please?

A. All right, sir. "Comprising on each section a lug projecting from substantially one-half of its free margin."

Q. Now, does this free margin in Berkowitz, Exhibit "1," extend from the corner that I am pointing to out here to this corner (indicating) which is near the number "28"?

A. That would be according, Mr. Smith, to how much value is put on the word "substantially" in this claim. It so happens in the Berkowitz structure, the bottom end of that lug is tapered to the vanishing point when it reaches the end furthest from the body of the box, having the effect of leaving an opening when the box is erected. Every sample that I have seen made of that box—and I have made some myself and seen others that others have made—leaves such an opening or an open space

(Testimony of Ross A. Himes.)

between that lug and the adjacent edge of the next lug over which it is supposed to overlay. It [286] does not overlay in its entire length; so I would question that in the Berkowitz box you have a coverage of one-half of the free margin. I question that very strongly.

Q. Is it not true, however, that in every lock-bottom box the locking action has to take place exactly at the intersection between the—of the diagonals between opposite corners?

A. Would you mind repeating that? I don't think that is correct.

Q. Every box that is four-sided, you can draw a diagonal from opposite corners, can you not?

A. You can.

Q. And those diagonals will intersect, will they not? Let's look at Parks figure 7, a diagonal from this corner 14 to this corner 10, and from the corner 16 to the corner 12——

A. Yes.

Q. ——would be an intersection, would it not?

A. Yes.

Q. And the intersection would be exactly the point at which the locking action takes place, the interlock?

A. That is not necessarily true, Mr. Smith. I have seen boxes where the interlocking means is not effected on an intersection of the diagonal. It is accomplished [287] somewhere on one of the diagonals, that is not necessarily true.

Q. In the Parks box it does happen to be exactly in the center, does it not?

A. That is right.

(Testimony of Ross A. Himes.)

Q. Is that not true in the showing of the Berkowitz patent? A. Yes, I would say that it was.

Q. Therefore a line from the corner between the parts large B and large C, this diagonal coming down here and extending to near the numeral 28 is a diagonal of the box bottom; and that point with the numeral and the line 22 point 2 would be exactly in the middle, would it not?

A. In that particular box, yes. That is a square box.

Q. Does not this lug 21D extend from that point to the corner adjacent to the numeral 28?

A. That again forces me to repeat my observation of a few moments ago.

Q. Which has to do with the taper, is that right?

A. It has to do with the taper to the vanishing point at one end.

Q. Does the claim say anything about a taper or not a taper? A. This claim?

Q. Yes. [288]

A. No. This claim states that it covers one-half. I am questioning that Berkowitz covers one-half.

Q. Does it make any difference that this coverage down here may be extremely slight?

A. A great deal of difference, Mr. Smith—a tremendous amount of difference.

Q. Is there anything more to that claim that you haven't read? A. Yes.

Q. Will you continue?

A. "Said lugs being staggered with relation to each other when said bottom wall is closed."

(Testimony of Ross A. Himes.)

Q. Are those lugs 21 and 21B staggered with relation to each other when the bottom wall is closed? A. Yes.

Q. That is shown in figure 6, is it not; you can look at the drawing?

A. Yes, I know the drawing well enough to say that they are staggered with relation to one another.

Q. Yes, that is true.

A. "The connection of said bottom elements to each other."

Q. The word "elements," I believe, describes the parts that lie above the creased line 23 and below the creased line 23; is that right?

A. You would have to assume that, I suppose—if you are [289] going to assume that they are two elements.

Q. Yes; all right.

A. "And to the side walls."

Q. In the assembled box are not those bottom elements joined to the side walls?

A. In the assembled box they are.

Q. And the first three words of the claim are?

A. "A folding carton."

Q. All right.

A. "Affording a positive means for moving the bottom sections toward position for closing said bottom wall."

Q. Do you grant that that occurs in the Berkowitz box?

A. In the Berkowitz box that same positive means for moving the bottom sections toward posi-

(Testimony of Ross A. Himes.)

tion for closing said bottom walls up to there is true.

Q. That is right.

A. And the rest of the claim reads, "and for engaging said locking means."

Q. Do not these locking means—the ends of the lugs 21D and 21B, engage when this box is set up?

A. They will not engage automatically.

Q. They are shown engaged in figure 6, are they not?

A. They are shown engaged in figure 6, but they will not engage automatically.

Q. Were they not engaged in this model when the box was [290] erected without the use of any other means than pressure from the opposite corners?

A. Before I answer that I will have to make an observation here that this box is not made according to the drawings shown in the Berkowitz patent.

Q. Very well. In what respect is it not the same?

Mr. Mellin: Before you untangle that you recall Mr. Thom said there was breaking and bending of the tabs; will you state whether you are doing that now or whether it was already done?

The Witness: It was already done. That is one of the two things I was going to mention primarily. Before this box was demonstrated the other day—I had better show this to the jury also—this box had either been worked a number of times—it was not a fresh sample—or it had been deliberately arranged so that these semi-circular portions at the

(Testimony of Ross A. Himes.)

ends of the lugs were bent upward. The board is cracked, effecting a crease line so that when for maybe the fourth, or fifth, or dozens of times, the box is to be closed together for closing, there is no resistance of those little semi-circular portions to assuming their proper position. In other words, they have been pre-guided so that they will do that.

Another point that was brought out in relation to [291] this same sample——

Q. (By Mr. Smith): Excuse me just a moment. That is just your opinion that they were pre-guided?

A. I say perhaps they were pre-guided. Perhaps the box was worked so many times that it gave the same effect as if it were pre-guided, Mr. Smith.

Q. Thank you.

A. The second point with which this sample does not conform to the Berkowitz disclosure is that this same curved portion at the end of these lugs is shown on all of the Berkowitz drawings as being, to my—and to anybody else's eye that I have ever talked to that looked at the Berkowitz drawings—a complete half circle in outline.

If the jury had opportunity and your Honor had opportunity to inspect the sample closely, you could see that the portion comprising the end of the lug which is a complete half circle in the Berkowitz drawings is here cut down to closer to a quarter of a circle which obviously means that it is easier

(Testimony of Ross A. Himes.)

to guide those sections past one another even though they might not have been previously worked or guided so that they would pass one another.

Let me clarify that by saying that it is my contention that if a box similar to this, following [292] closely and specifically the Berkowitz disclosures in all details, were made freshly and had never been operated before, it would not inter-engage and interlock automatically when pressure was applied to the ends of the box.

Q. You are in effect saying that to make a box according to the Berkowitz patent you have to follow every exact detail shown in that patent, is that right?

A. Mr. Smith, when you are speaking about the disclosures in a patent, if you deviate from those disclosures you are going into something else which might possibly infringe other rights.

Q. You testified you have been a sample maker?

A. I have been a sample maker for many years.

Q. And we are talking about sample folding boxes, are we not? A. Oh, yes.

Q. And you have made samples for customers to meet their requirements, have you not?

A. I have made them possibly for my own use because of my particular niche in this industry that I am in. I have very seldom made them for customers.

Q. If you were making them for customers, and the customers present to you an idea of how they

(Testimony of Ross A. Himes.)

want their box made, do you follow exactly the way that they say that it must [293] be made?

A. I would have to answer that by saying that if I deviated knowingly into ground that might perhaps make a better box than the one that they had been using, or requested, I would be inclined to be a little bit careful about infringing the claims of valid patents.

Q. Well, that isn't the question we are talking about right here. You have just said that deviation might occur, is that right?

A. Deviation might occur without thought, yes; any number of times.

Q. Isn't it true that the deviation might occur because you are skilled and you use the things that you know?

A. I wouldn't consider it too skillful to deviate to the point where you were laying yourself liable to action for infringement. That to me would not be skillful.

Q. Will you step down and take a very careful examination of this drawing?

A. Yes, I will be glad to.

Q. I call your attention to the bottom section attached to the wall with the large letter "B" in figure 1 of Berkowitz and I ask if that which is above the pencil line and extension of the dotted line 23 is a true half circle?

A. That one doesn't appear to be a true half circle. May [294] I have the pointer?

(Testimony of Ross A. Himes.)

Q. Yes, you may.

A. In this drawing, and I assume that this is a blown-up photograph. Is that right?

Q. A photostat.

A. A photostat. The one on the other panel is, to my eye, a true half circle. Throughout the rest of the drawings, calling attention in particular to the same section in figure 2 in both bottom sections, we have a true half circle. So far as we can see in figure 3, it is a true half circle. In figure 4, similarly, it is hard to determine figure 5. And most certainly in figure 6 in the view of the bottom of the box after it is inter-locked, those are true half circles on either side of the center.

Q. You have said that this lug 21D is a true half circle, is that right, in figure 2?

A. It looks like it.

Q. Will you take that pencil and examine this line and this line?

A. Mr. Smith, are you trying to prove these are not identically similar sections?

Q. No, I am not. We have already admitted they are identically similar sections.

A. Then would you say that this would be identically [295] similar to this?

Q. There are slight variations or deviations, one from the other, are there not?

A. Apparently there are slight deviations one from the other which to me would not make them identically similar. If you want to get down to figure

(Testimony of Ross A. Himes.)

6 and do the same thing, apparently there they are identically similar, are they not?

Mr. Mellin: Let him ask the questions.

The Witness: Pardon me.

(Witness returns to the stand.)

Q. (By Mr. Smith): Returning again to that last phrase of the claim which you read. I think you have it in mind do you not? A. I hope so.

Q. If you like to, I hope you will take the time to read it.

A. If necessary, I shall read it.

Q. The language says that these elements 21D and 21B inter-engage and lock, is that right?

A. Now I will have to refer to the other claim. Of course, we don't refer in this patent to 21D and 21B.

Q. No. We are reading that claim in view of the Berkowitz drawing.

A. "Affording a positive means"—"a positive means"— [296] and the word positive is said advisedly and accented advisedly—"for moving the bottom sections toward position for closing said bottom wall and for engaging said bottom means.

Q. We have agreed that the bottom closes, did we not? A. Not entirely.

Q. I did not say locking—I said close.

A. It will not close.

Q. It moves toward position for closing, does it not?

A. It moves toward position for closing of it. It

(Testimony of Ross A. Himes.)

can be engaged by putting the fingers inside of the box and pulling the locking parts past one another.

Q. Take the box and fold it.

A. I will be glad to do that. I know, of course, it will reach the closed position because of what I just described to the jury as being preparation for such closing. I will hold the bottom up so that the jury can see it. The jury will notice that those ends of the lugs having been pre-prepared, we get by there rather easily and the box closes. (Demonstrating for the jury.)

Q. Thank you. Now, let us refer to claim 6. I beg your pardon. Going back a moment in your testimony, you have said that the ends of the lugs here have been manipulated in the opening and closing of this box, have you not?

A. They have been pre-bent by one means or the other.

Q. Have you ever read Plaintiffs' Exhibit "B," the file [297] wrapper in the file patent history back of the Parks patent?

A. No; I never read file wrappers, Mr. Smith. That is the job of my attorneys.

Q. However, the language that is contained in them is sometimes rather explanatory, I believe, and I would like to call your attention——

Mr. Smith: If I may approach the witness, your Honor——

Q. (By Mr. Smith, continuing): ——that this

(Testimony of Ross A. Himes.)

is a letter to the Patent Office addressed to the Commissioner of Patents; it is marked with the identifying character 5, the line "B" underneath it?

A. That is right.

Q. That it is marked as page 26, page 27 and page 28 of this record in pencil marks and in photostats?

A. Those are in photostat form, those marks.

Q. I call your attention on this page marked 27, which also has the numeral "2" on it, about the fourth line, and ask you to read it, please?

A. Under the heading "Remarks"?

Q. Yes, sir.

A. Are these remarks of the examiner?

Q. No, sir. If you will look at the ending, you will see that they are signed—— [298]

A. I would like to understand what I am reading.

Q. All right. If you don't mind I would like to explain that this is a letter written by the attorneys for Mr. Parks. It bears their signature, "Bair, Freeman and Sinclair." A. I see.

Q. And that we can all see the signature that appears here on this exhibit.

A. Do you want me to read starting with the words "Herewith enclosed"?

Q. Yes. If you wish to read it all it is perfectly all right. I think we will save a little time if you read beginning with that line "Herewith enclosed."

A. All right. "Herewith enclosed are models of the Cramer carton and of applicant's carton."

(Testimony of Ross A. Himes.)

Q. Who would applicant be?

A. Applicant, I assume, would be Parks, Hildenbrand and their attorney.

Q. That means, does it not, to you, that there were some models accompanying this letter to the Patent Office, is that right?

A. That is what it says, Mr. Smith.

Q. Yes? A. Yes.

Q. On the next page would you read the first full paragraph [299] that appears there?

A. "In applicant's device, on the other hand, it will be noted that the lugs 70 snap past each other."

Q. Just so that the jury can follow, I think that we are talking about this numeral "70" and this lug along here, are we not?

A. I would rather see it closer.

Q. Yes, if you wish.

(Witness approaches the easel and exhibit.)

Q. (By Mr. Smith): Do you see that number 70? A. Yes.

Q. And that that designates a lug right along there?

A. Yes; no doubt that is what they are referring to.

Q. May I draw a line from here to here and indicate that that is the lug?

A. If you so please.

Q. And probably although this is not marked, is this element on the lower part of Plaintiffs' Exhibit "G" that same lug?

(Testimony of Ross A. Himes.)

A. Yes. Do you want to mark that in the same manner?

Q. Let's put the numeral "70" on there, shall we?
A. I don't mind.

Q. All right (drawing numerals 70 on exhibit). Is that right?
A. That is all right. [300]

Q. Will you just read the language?

A. "In applicant's device, on the other hand, it will be noted that the lugs 70 snap past each other and the bottom can then be pressed to a flat position. When, however, it is pressed upwardly from the bottom, the lugs engage each other, tending to resist such pressure."

Q. Just a moment. What do you mean by—what do you understand to be meant by the words, "pressed to a flat condition"?

A. I would assume that means a continuance of the pressure on the ends. Obviously if you work one of these models you can see what that pressure is. It says here that these lugs "snap past each other."

Now, if they snap past each other they must go into a flat position or they wouldn't snap; "and the bottom can then be pressed to a flat position."

Q. Such as we have in Plaintiffs' Exhibit "13"?

A. Well, with the exception that those will not snap past each other.

Q. Will you go on and read the language, please?

A. "When, however, it is pressed upwardly from the bottom, the lugs engage each other, tending to resist such pressure."

(Testimony of Ross A. Himes.)

Q. Are these lugs engaged?

A. Those lugs are inter-engaged, yes. [301]

Q. And they would resist pressure from underneath, is that not right?

A. That is according to whether or not the full half circle is used in making the box. If a full half circle was used, I would say they would have a pretty good chance of remaining engaged. If they are cut down below a half circle I would say they wouldn't.

Q. This stamp of the Clerk's has weight, does it not? A. Yes, I suppose.

Q. And it would be exerting pressure upward, would it not (placing Clerk's stamp on the box)?

A. All right, it holds the stamp.

Q. Shall we go on? A. Yes; pile it on.

(Mr. Smith places stapler on box.)

A. Have you an ink bottle handy? I mean don't put it out on the corners, Mr. Smith, that isn't fair.

Q. (By Mr. Smith): Well, how about a pitcher of water?

A. Well, a pitcher of water would be held up by the ends—by the side walls.

Q. Oh, now, just a moment—the side walls help in supporting this bottom, do they?

A. When you have the box upside down, yes.

Q. We are talking about pressure that would collapse that thing. Does it make any difference if the box is [302] upside down or from the bottom

(Testimony of Ross A. Himes.)

upward if the box is right side up; pressure is pressure, isn't it?

A. What purpose is there in having the box resist that upward pressure? When contents is put into the box, pressure is downward, isn't it? Here I am asking you questions again. Excuse me, Mr. Smith.

Q. I understood it was your point that in the Parks patent the point was made that this box would resist that kind of pressure?

A. It does.

Q. Did it not?

A. Yes. You are just saying pressure. You are not going into degrees of pressure.

Q. All right. Does the patent say how much pressure it should resist?

A. No. It resists pressure, Mr. Smith. Let's have it resist pressure. Do you want me to go on?

Q. Yes. There is a little more language in that same paragraph I would like to have you read.

A. All right. "The model has been operated a great number of times"—this is the model he sent to the Patent Office—"and one of the lugs is somewhat weakened." He is apologizing for that, you see.

Q. Yes.

A. But it can be readily seen that when it is not so [303] weakened, it will catch on the other lug and thereby actually provide an interlocking feature to prevent refolding of the carton by mere upward pressure on the bottom.

(Testimony of Ross A. Himes.)

Q. Does the letter "X" appear in there—in the next sentence, I believe?

A. There is an "X." I thought that was a correction. What is that "X"?

Q. It apparently was used in that model to designate a lug, was it not?

A. "The model has been operated a great number of times and one of the lugs marked "X" is somewhat weakened."

Q. Now, unfortunately we do not have access to the model which was employed, but I would call your attention to this page 29 of this file wrapper exhibit. It is headed by the Patent Office and is addressed to Bair, Freeman and Sinclair, is it not?

A. Yes.

Q. Would you read the two or three sentences that appear there?

A. "Responsive to amendment filed December 4, 1934. The samples filed on the date of December 4, 1934, are returned herewith. The case is being passed to issue."

Q. Thank you. That would appear to mean that the Patent Office had returned the models—the samples to the [304] attorneys? A. Yes.

Q. And explained the fact that we would not find them in the file at this time, is that right?

A. I suppose so.

Q. Now, let us refer to claim 5 of the Parks patent which you have before you and again we will go through, element by element, and look at the

(Testimony of Ross A. Himes.)

Berkowitz drawing as we did before; I think we can go a little faster this time—but if not, why, you just take your time.

A. Thank you, sir. “Claim 5. A folding carton comprising a plurality of side walls hingedly connected at their edges to form a polygonal”—is that it?

Q. Polygonal. In the first place, you have said a plurality of side walls—that is more than two, is it not? A. Yes.

Q. It would be more than one, I believe?

A. Yes.

Q. It could be two or three or four or five, something like that?

A. Yes. “A polygonal enclosure.” That would be a question—it might be more than three.

Q. You know what a polygon is?

A. Yes. [305]

Q. Will you accept Mr. Christensen’s definition of a polygon?

A. I will accept Mr. Christensen’s definition of a polygon.

Q. Then we have 34, do we not?

A. Yes. “Hingedly connected at their edges to form an enclosure.”

Q. You say hingedly connected at their edges; would you say that lines ten, eleven, twelve, and a joiner at the line thirteen, which is where the folding flap is, are hinged connections? A. Yes.

Q. All right.

(Testimony of Ross A. Himes.)

A. "And a bottom wall formed in a plurality of sections."

Q. How many is that?

A. A plurality is more than one, Mr. Smith.

Q. We have here two, do we not?

A. You have there two, yes.

Q. Thank you.

A. "Each section being hingedly connected at two edges to the bottom edges of two adjacent side walls."

Q. Is that not the condition that exists in the Berkowitz drawing—each section, and this is a section and it is connected to two adjacent side walls as shown in figure 4, is it not? [306]

A. When the carton is put together and completed and erected, that is true.

Q. Thank you.

A. "And being creased for folding on a line extending across the section from a point adjacent the hinged connection between the two side walls to which said section is connected."

Q. Now, the line 23 we consider the creased line, do we not? A. Yes.

Q. And it extends from adjacent the corners of the two adjacent side walls, to which it is connected, do they not? A. Yes.

Q. Do you think that figure 4 fairly shows that?

A. Yes.

Q. Thank you.

A. "Whereby said section may be folded into

place parallel with said side walls when the carton is collapsed.”

Q. That is this flat condition we are talking about?

A. The flat condition, yes. “The free margins of said sections”——

Q. That again is this wall of sort of a broken diagonal line along here, is it not?

A. Yes. It is the edge from one corner to the other [307] corner.

Q. Yes.

A. “The free margins of said sections being formed with similarly shaped inter-locking means.

Q. Are these the similarly shaped inter-locking means, the elements 21D and 21B? A. Yes.

Q. Thank you.

A. “Adapted to inter-engage for holding the carton in extended position.”

Q. Do they inter-engage in this case?

A. They are shown inter-engaged in that drawing.

Q. Did they in the model of Exhibit “13”—did they inter-engage in this model when it was erected? A. Yes; and I have explained why.

Q. Yes.

A. “The interlocking means of each free margin comprising a lug.”

Q. Again that is this 21B and 21D, is that right? A. Yes.

Q. All right.

A. “Extending along one-half of said margin.”

(Testimony of Ross A. Himes.)

You will notice in this case, Mr. Smith, we do not say substantially one-half; we say one-half.

Q. That is right. [308]

A. That means one-half—not almost one-half.

Q. Does the element 21D extend from the center of the carton—and I will grant your word tapering—in a tapering manner outward to that corner adjacent to the numeral 28?

A. I don't know whether your language is completely accurate. It does taper toward that corner from the widest part of the lug to the corner.

Q. This is Defendant's Exhibit "4," a copy of the Berkowitz. I merely want to save you having to go way over there. A. Yes.

Q. Do you see this dotted line 20 which extends from that center outward near the numeral 28?

A. Yes.

Q. Would you say that that dotted line extends half of that free margin?

A. With the same reservation, that it meets the tapering line somewhere near the corner.

Q. All right; we will pass the point. You may go on.

A. "The inter-locking means of each free margin comprising a lug extending along one-half of said margin and adapted to over-lap the unlugged half of the margin of the next section."

Q. In this erected position of Berkowitz, figure 6 is not [309] the lug 21B—this lower one on the right-hand corner—over-lapping the unlugged half of the opposite section?

(Testimony of Ross A. Himes.)

A. A substantial portion of it is.

Q. Would you care to just—I will have to ask you to step down, I am sorry.

A. That is quite all right. I don't mind at all (witness approaches easel).

Q. Do you see that lug marked 21B that lays right in there? A. Yes.

Q. A dotted line on one side and a solid line on the other and a rounded end? A. Yes.

Q. Is that over-lapping this portion right here which is marked?

A. In that figure 6 on this lug—the drawing is shown so that that appears to be over-lapping on the corner. However, on the one opposite it comes to an exact point. There we get into the question of similarity.

Q. How do you explain the fact, if you can, I don't expect you to know exactly—but how do you explain the fact that that does show over-lap?

A. If we wanted to go into the specifications of Berkowitz, I think that that point would be made a lot clearer. [310]

Q. I will give you an opportunity to do so. Is there any further language in claim 6 that you haven't read?

A. Yes. "And adapted to over-lap the unlugged half of the margin of the next section, the bottom sections being automatically moved into position for engagement of the inter-locking means when the side walls are extended to the normal open position."

(Testimony of Ross A. Himes.)

Q. Do these various views, figure 3, figure 4, figure 5, indicate that that is a condition that takes place in Berkowitz?

A. That is what is no doubt ambitiously sought in Berkowitz but which does not happen in constructions made according to the Berkowitz disclosures.

Q. I am returning to you Defendant's Exhibit "4," a copy of the Berkowitz patent, and I am calling your attention to page 2, the line beginning number 55, and I ask you to read this wording—"To set up" and so forth?

A. Do you want me to start with line 40 where it says "Binding or tying means in the form of cords"?

Q. Let's answer my question first and then you will have your opportunity to discuss that later.

A. Oh, I see. I mistook the place here.

Q. Line 55, please.

A. 55. "To set up the box for filling"——

Q. Now, we are talking about the Berkowitz box, aren't we? [311] A. Yes.

Q. All right.

A. "To set up the box for filling, it is set up right, as will be understood from figure 3."

Q. That is this position—upright—the bottom parts are downward and this is upright, is that it (indicating with Exhibit "13")? A. Yes.

Q. All right.

A. "And the operator will grasp the corners

(Testimony of Ross A. Himes.)

thereof at the upper end of the hinge lines 10 and 12"—that is the two opposite ones there.

Q. We are talking about these, then, aren't we?

A. Those, yes. "And draw the same apart somewhat sharply."

(Mr. Smith demonstrates with carton.)

A. Oh, beautiful.

Q. (By Mr. Smith): Will you do it?

A. Not on that box, if you don't mind. It has been worked seventeen times, sir. I would like to try it on a fresh sample.

Q. All right.

A. "Drawn apart somewhat sharply with the result that the hinge lines or corners 11 and 13 will be brought toward each other"—

Q. Just a moment. These corners that you are speaking [312] about, 11 and 13—are this corner down here and this one out here, is that right?

A. Yes.

Q. They are not the ones that have any connection with a division between the bottom halves, are they?

A. Well, now, wait a minute (witness approaches the easel and the Berkowitz drawing).

"With the result that the hinge lines or the corners 11 and 13 will be brought toward each other"—you are pulling on 10 and 12, I imagine.

Q. What?

A. You are opening the box by pulling on 10 and 12, aren't you?

Q. No. Oh, yes, you are right—I beg your pardon.

A. “While the bottom wings ‘B’ and ‘D’ will snap downward into flat position, each wing extension, 21B or 21D gliding easily and directly over the straight edge 19 of the opposite wing and coming directly into inter-locking engagement with the opposite wing in the notch 22, but is effectively supported by integral connection along the hinged line 15 or 16 with one side wall and with overlapping and inter-locking engagement with the bottom edge portion of the next wall through the flange 18B or 18D and”—do you want me to continue?

Q. I don’t believe you need to go any farther. We have [313] got the box erected, have we not?

A. Yes. We have the box erected. Do you want my comment on that, Mr. Smith?

Mr. Mellin: No.

Mr. Smith: No. Your attorney will probably reveal it when he has his opportunity.

* * *

Q. In Exhibit “G,” which is before you, we marked a lug with the numeral 70, did we not?

A. Yes.

Q. By drawing a line from that notch to this corner? A. Yes.

Q. Will you describe the shape of the end of that lug, please?

A. Which end, Mr. Smith? [314]

Q. The end nearest the notch.

A. The end nearest the notch?

Q. Yes.

(Testimony of Ross A. Himes.)

A. It is shaped—well, the most part is straight and parallel to the crease lines which join the side and end walls. And it has been rounded on the outside corners.

Q. I think it is a little bit confusing when we use the word “parallel to the creased line,” so I will point to the drawing in the Parks patent figure 1, and I think that you can see the lug in the Exhibit “G” that you have before you; and starting at that notch, at the bottom of that little notch, what is the first line that extends from that that forms part of the end of the lugs; is it a straight line?

A. This is a straight line, yes.

Q. And what does it join with?

A. In the open position of the box?

Q. Yes, sir; what does that straight line join with in the end of the lug; does it join with another straight line?

A. It intersects another straight line, yes.

Q. It intersects another straight line. We are talking, then, about two lines intersecting, are we not?

A. That is right. [315]

Q. And when two lines intersect, do we enclose an angle?

A. There must be an angle if two straight lines intersect.

Q. Then the end at that particular point is angular, is it not?

A. Yes.

Q. And then that second straight line intersects with an additional straight line, does it not?

I am speaking, sir, of this line which runs along

(Testimony of Ross A. Himes.)

the outside of the lug, somewhat parallel to the pencil line which was drawn on here?

A. Oh, excuse me. I thought you were referring to the line running in the other direction.

Q. No, sir.

A. Well, then, I will have to qualify what I said a moment ago. Instead of a square intersection of those two lines to which you are referring, we have a rounded corner.

Q. Let us simplify this a little bit so that we know what lines we are talking about?

A. Yes.

Q. If you will examine the patent, do you see the numeral "72" right there? A. Yes.

Q. And does that indicate this line right here?

A. Yes.

Q. Can we put a "72" here and draw a line right to that [316] line, there? A. Yes.

Q. And then we will understand that that means that line, wouldn't we? A. That is right.

Q. Do you see the numeral "74," right there?

A. Yes.

Q. If I put a "74" here and draw a line to this line—this edge of the lug—am I doing as—are we talking about the same thing as is in the patent?

A. That is right.

Q. All right. Then when the lines 72 and 74 intersect, we form an angle, do we not; we enclose an angle?

A. We enclose an angle. We have, of course, a corner rounded off. There is no square intersec-

(Testimony of Ross A. Himes.)

tion. Aside from the rounding off you have an angle.

Q. Why is that rounded off?

A. For easier operation of the inter-locking sections.

Q. Oh. Now, unfortunately the patent does not show—yes, it does—do you see that number “64”?

A. Yes.

Q. Would you point out on here to what that numeral refers?

A. That is the edge, here, Mr. Smith (indicating).

Q. All right. May I mark that “64” and draw a line to it? [317] A. Yes.

Q. Then the lines 72, 74 and their joinder of the line 74 with the line 64 indicates angularity throughout that arrangement, does it not?

A. Yes.

Q. The end of the lug is therefore angular, is that right? A. That is correct.

Q. I am handing you Plaintiffs' Exhibit “J,” which comprises these several specimens introduced, and I believe your testimony is that they are the product of your licensees, is that right?

A. These are the products of our licensees.

Q. I would like to ask you to refer to them and see if any of them or all of them carry the patent number 2011232?

A. This one does. Would you like to see it?

Q. Just hold it up so that the jury can see where it is.

(Testimony of Ross A. Himes.)

A. It is carried on one of the bottom panels usually. It reads "Himes patent number 2011232" in print.

Q. That is the Parks patent you are talking about?

A. Yes, that is the number of the Parks patent.

Q. Will you go on and see if any of the others do the same?

A. This has the same wording "Himes patent 2011232" in print.

Q. Just determine quickly if there are others made similarly. [318]

A. I will have to look at them to see. Sometimes these are impressed in the board with steel dies rather than printed, and it is a little hard to find it. I can't find it on this one. Possibly it is somewhere rather than on the bottom.

Q. All right; we will separate that from the others, if we may.

A. This one the patent notification reads "Himes Folding Carton, Patent Numbers 2,243,421, 2,284,283, and 2,011,232; Burt and Fletcher Company, Kansas City, Missouri."

Q. We will put that in this first pile, then.

A. All right.

Q. Any others?

A. Himes Patent Number 2,011,232.

Q. Any others?

A. I can't find it in print on this carton.

Q. Put this in our second pile, shall we, sir?

A. All right. Well, this is certainly made by one

(Testimony of Ross A. Himes.)

of our licensees, but I can't right now find the patent number.

This carton, made by Morris Paper Mills in Chicago, reads "Patent Numbers 2,460,229, 2,389,318, Patent Number 2,011,232"—the last being the Parks patent. These other two are the patents on other features of the box.

Q. We have one more right here.

A. This reads "Himes Folding Carton, Patent Numbers 2,243,421, [319] 2,011,232 and 2,284,283."

Q. We have four then which apparently do not have the patent number of the Parks patent on them; is that right?

A. On first inspection—casual inspection.

Q. Yes. They may be there?

A. They may be there.

Q. I will grant they may be there and they may not be. But at least of this Exhibit "J" there was 1, 2, 3, 4, and 5 which bear the Parks patent number on them?

A. Yes.

Q. Can you by examination of any of those and all of those tell us whether there is a single one that has an angular-shaped lug?

Mr. Mellin: If your Honor please, for the purpose of endeavoring to shorten this—the claims were read this morning and there wasn't anything said about angular lug. We are now going into claims that were limited out of the case by stipulation.

Mr. Smith: No, I don't think we are, your Honor. The witness' testimony and his statements from the stand would seem to indicate that there

(Testimony of Ross A. Himes.)

was some material difference between having the lugs rounded or angular.

The Court: Well, for that purpose I will [320] permit it.

A. Are you concerned, Mr. Smith, with the interlocking edges themselves primarily?

Q. (By Mr. Smith): The ends of the lugs.

A. I find these lugs starting straight up from their notch or from the corner and being rounded quite a bit more than we show in the Parks patent—more according to the teachings of the Himes patent than the Parks, I would say.

Q. However, on general appearance, what would you describe the ends of each of those lugs in the Exhibit “J”?

A. Starting straight from the bottom and being rounded at the corner.

Q. We could say they are round-ended?

A. Starting straight from the bottom and being rounded at the corner.

Q. Do they have waste material in connection with them? A. The lugs?

Q. Yes, sir; and the bottom flaps?

A. Yes; there is a lot of unnecessary material.

Q. In the same sense that you said that the Chadwick carton had waste material in it, is that right?

A. Yes, that is right. The Chadwick carton follows this more closely. [321]

Q. This is the model that you cut the waste material from, is it not? A. I believe it is.

(Testimony of Ross A. Himes.)

Q. What is the shape of the end of those lugs?

A. Let me get a closer look at it, if you will, please?

Q. All right. I am speaking about Plaintiffs' Exhibit "H."

A. It is a little hard to determine whether there is a straight portion near the intersection, right in the notch, or whether they are made completely round; I believe I would say they start being straight and then [322] are curved. It is hard to determine.

Q. In general, what do you think the appearance is?

A. I think the general appearance of these would lead more toward a curve than a straight line.

Q. In other words, more round ended as in Berkowitz than angular as in Parks; isn't that true?

A. Possibly so, if you want to make that broad a comparison.

Q. Do you think it is unduly broad?

A. Well, my only observation on that, Mr. Smith, would have to be that no matter what shape that particular intersection takes, whether it is straight, whether it is curved, whether it is round, the manner of operation and the end accomplished is exactly the same in both instances. It is still an inter-lock.

Mr. Smith: That is all of the questions that I have to ask at this moment.

(Testimony of Ross A. Himes.)

Mr. Mellin: May I clear up a few things, your Honor?

The Court: You may.

Cross-Examination

By Mr. Mellin:

Q. Mr. Himes, you testified concerning what you considered to be the difference between Berkowitz's disclosures—that is a box made according to Berkowitz and according [323] to Parks. In general, what is the difference—I mean in general—here is a Berkowitz box and here is a Himes box; what is the difference?

A. Well, the obvious difference to anyone that tries to use it is that the Berkowitz box is not automatic.

Q. We had a discussion with Mr. Hyndman yesterday morning with respect to making these boxes oblong; what do you have to say to that?

A. If I recall yesterday's testimony correctly, I think that Mr. Hyndman said if you would give him two weeks and ten dollars and a Staude Master Gluer that he could manufacture Berkowitz boxes on a machine.

Q. And in oblong shape?

A. And in oblong shape.

Q. And without changing the Berkowitz structure, do you recall that?

A. I believe that is right.

Q. What do you have to say to that in general?

A. Well, in general, I would say that it was a

(Testimony of Ross A. Himes.)

big order. First, from a box-making standpoint, the Berkowitz box as disclosed in the Berkowitz drawings could never be made on any machine that is presently in existence. A machine would have to be built especially for it—not just attachments added. I would be glad to show you why, if you wish. [324]

Q. I will get to that in a moment. Now, you made some samples, and the one which I have in my hand is a sample that you gave me. I understood from you that it had not been—it is to represent Berkowitz and it is a square one—and I understand from you that it has not been once erected or more than once erected?

A. It is a fresh sample. It has not been used.

Q. Will you tell us if that exactly conforms to the Berkowitz patent as you measured it off of the Berkowitz patent in proportion?

A. This sample I made myself, and it conforms exactly to what is disclosed in the Berkowitz drawings with the fact held in mind, of course, that the Berkowitz box is shown square, and I produced an oblong box.

Q. Just a moment, do I have the wrong one? Is that the square one or the oblong one?

A. This is the oblong one.

Q. I beg your pardon.

A. You don't want that (handing box back to counsel)?

Mr. Mellin: I apologize to the jury. I gave him the wrong one.

(Testimony of Ross A. Himes.)

Q. (By Mr. Mellin): Is this it (handing box to witness)? Has this been used before?

A. (Examining box): No, this sample has not been used before. This is a fresh sample. [325]

Q. Will you explain if that is made exactly in accordance with the Berkowitz disclosure?

A. This is made exactly in accordance with the Berkowitz disclosure.

Q. Did you make it yourself?

A. I made it myself.

Q. Did you make it by measuring off of Berkowitz so you would be sure to be accurate?

A. Yes; I made it to scale.

Mr. Mellin: May the witness approach the jury your Honor, and show it to them?

The Court: Yes.

Mr. Mellin: And then attempt to open it in the normal condition?

(Witness shows box to jury.)

Q. (By Mr. Mellin): And explain when you do that why it will not function to inter-lock, if it does not function. Now, would you demonstrate by showing them what occurs when you attempt to close it?

A. Well, what occurs when you attempt to close it, is that we have no positive means in this bottom construction for leading the inter-locking half circles into the correct position for closing.

Q. Then as I understand it you must leave it to chance, perhaps? [326]

A. You must leave it to chance. I might say that

(Testimony of Ross A. Himes.)

there is a possibility once in a while that one of these things might work—go all the way. But generally speaking a fresh sample——

Q. Can you hold it to one side so that his Honor can see it, too?

A. Yes. When a fresh sample—presumably a commercial sample which has not been worked before, is presented and it is to be opened for use, you will see that there is nothing to lead those opposing lugs on to the lugs next to them; and as you press towards center one will slide beneath the other instead of going over the top of the edge adjacent to the lug. Let me do that again. I want to be sure because this is an important point. It seems as though a lot is hinging on it. If the jury please, watch that action—especially in the upper and lower corners. The jury will see that there is nothing to lead that lug on to the edge or over the edge adjacent to it; and so those lugs—those half circles—when they meet, they butt up against one another. They don't slide past one another as we do in Parks. One or the other gives way, slides underneath the section, and the result is that when you try to hold anything in a box like that, it moves out in the other direction. There is no practical inter-lock in the [327] Berkowitz box.

Q. What happens if you bent those tabs and broke the goods before you did that, Mr. Himes?

A. Mr. Mellin, I believe that if you wanted me to I could prepare the semi-circular portions and use

(Testimony of Ross A. Himes.)

my fingers in such a way in opening the box that I would make it inter-lock, if you want me to do it.

Q. Well, would you bend those tabs and prepare them and then see if it will work?

A. You would have to bend them along the crease line. Would you like me to do that?

Q. If you would.

Mr. Smith: May I look at it before that is done?

Mr. Mellin: Surely.

Mr. Smith: Would you mind if I asked him one question?

Mr. Mellin: Oh, certainly.

Q. (By Mr. Smith): Can you invert that outwards so that the jury can see the bottom as you did a moment ago?

A. Yes (pushes bottom of box outward).

Q. With this ruler, holding along the crease line, will you just hold it right on the crease line so the jury can observe it?

(Witness demonstrates.) [328]

Q. (By Mr. Smith): Is that a true semi-circle?

A. That is a true semi-circle made with a pair of dividers.

Q. Or a compass? A. Or a compass.

Q. Will you do it with the other one?

Mr. Mellin: You made one with a half a quarter didn't you?

Mr. Smith: What was that?

The Witness: Yes.

Mr. Mellin: He made another box with a quarter.

(Testimony of Ross A. Himes.)

The Witness: I had no compass yesterday.

Q. (By Mr. Smith): How can you say that that center is exactly on that line if you were using a twenty-five cent piece?

A. This was made in Los Angeles, sir, with a compass. [329]

* * *

Q. (By Mr. Mellin): Will you do that now, Mr. Himes?

A. Yes. You want me to get this back together and prepare it so it will lock?

Q. Yes, make it so it will lock.

A. Shall I show the jury how it is prepared?

Q. Yes, if you will.

A. The first thing you have to do in order to make this box work at all would be to bend these flaps upward—crease them—it gives what amounts to a crease line although you are simply bending the material. Then if I guide those parts from the bottom, as I am holding it with my fingers, so that I push up on this panel here and on this panel, here, making sure that the lugs pass the sections next to them, I can make it interlock. You may have seen that before.

Mr. Mellin: May I offer the box just testified to by the witness as the exhibit next in order?

(Box marked as plaintiffs' exhibit "Q" for identification and received in evidence.)

Q. (By Mr. Mellin): Did you attempt to make a box such as this in oblong shape?

(Testimony of Ross A. Himes.)

A. Yes, I did.

Q. I hand you a box which apparently is oblong. Would you [330] show that to the jury and tell us how you made that and whether or not it follows the disclosures of the Berkowitz patent and if there are any changes in it such as in the location of the crease line, and the location of the lugs or anything, will you tell us how it was made by reference to this chart?

A. Yes. May I step up here Mr. Mellin and use a pointer?

Q. Yes; if you will.

A. (Approaches the easel): Of course, the box shown in Berkowitz is a square box. It doesn't show an oblong. But the question has come up in the last day or so as to whether or not a box made according to the Berkowitz could be made with the sides longer than the ends; in other words, rectangular in shape. I had never tried it myself, and I didn't know, so I proceeded to try it yesterday. I think I am correct in asserting that when that is attempted, there are four ways that we can attempt to do that job and still give us what we see disclosed in Berkowitz with the exception, of course, that it will be an oblong box instead of a square box.

I would say that the first way or one of the ways would be that we would have to make this distance (indicating) shorter, assuming that these are end panels and are shorter than the side panels "D" and "B." So assuming that this panel and this panel are of less [331] width than these other two;

(Testimony of Ross A. Himes.)

in order for this section to glue up onto this, this would have to be shorter, obviously; both of these would have to be shorter. Then taking that to start with, which would be a "must" of course, in order to fit this section on to this section, then we have another choice. Either we keep our 45 degree angle, here, in both cases so that the box can be glued together, which on an oblong box as I will demonstrate to you makes these lug sections occupy much less than half of the free margin, or we must allow the lug sections to occupy one-half of the free margin and run our diagonal crease line from the intersection of that half to the corner on something other than a 45 degree line.

Q. Why is that; why do you have to then start from the lug and go to the corner instead of on the 45?

A. I say if you want to maintain the fifty per cent relationship of these lugs to the complete free marginal section you must do that.

Q. Yes.

A. Then we can move from there—that gives us two choices there on one phase. Then we go to another phase. Now, let's assume that instead of these sections "C" and "A" being of less width—let's assume that those are of greater width, and that "D" and "B" are of [332] lesser width; in other words we will be putting these bottom extensions on the short side of the box. Then we have the reverse of the situation that I just told you. Again we have two choices within that—assuming that

(Testimony of Ross A. Himes.)

these are shortest, and we have a wide space here and a wide space here, then this edge—because it is going to be glued to this, and this edge because it is going to be glued to this, must be much greater than this short distance here and here (indicating). That leaves us with the condition, then, where we have the same choice. Either we must have a 45-degree angle still employed on these extensions in order to have the box flow together at all, because it won't unless they are 45 degrees—and thereby change the distance that the lugs cover the free margin section on the Berkowitz box or we must deliberately make these lugs fifty per cent of the free margin sections in order to overcome that and run our diagonal crease line from the intersection of the lug with the free marginal section to the corner, regardless of the angle that we get. I have done all four of those things just as accurately as I could with the limited tools available to me, here, and I would like to demonstrate them, Mr. Mellin.

Q. I will hand you what appears to be four samples; would you [333] take them up in your order?

Mr. Mellin: May I have them identified?

(Sample boxes marked in evidence as plaintiffs' exhibits "R," "S," "T," and "U" for identification.)

Q. (By Mr. Mellin): Now, these four samples that have been marked just now as "R," "S," "T" and "U," are samples made by you?

A. By me, yes.

(Testimony of Ross A. Himes.)

Q. And you have attempted to correspond as closely as you possibly could to the Berkowitz patent and dimensions? A. Yes.

Q. Will you proceed from there?

A. I have tried to accomplish what I have just been describing to the jury, these four phases of making a rectangular box.

Q. And those four phases are the only four choices you have that you can make?

A. They are the only four choices that are possible that I can see.

Q. With a box that is a rectangle other than a square?

A. May I apologize to Mr. Chadwick for using the Nalley's Potato Chip Box for the purpose?

Q. Go ahead.

A. Now, when we start to attempt to make a rectangular box [334] instead of a square box and still follow the Berkowitz drawings as close as we possibly can, this will be the first choice that we had—as just described to you.

You can see the same elements, here. You will notice that this panel corresponds with this one; and this panel corresponds to this one, and that they are of less width than the other two which corresponds to "E" and "D" respectively. That is, we have considered these the long panels of the box; we have considered the panels as the end panels of the box. That means then that in order to form a bottom section according to the Berkowitz disclosures—because obviously this distance is going

(Testimony of Ross A. Himes.)

to fit up to here. It can't be shorter or longer than that distance. It must be the same.

Similarly the flap on the other side must correspond to the length of the other side panel.

There are two alternatives, but the first alternative is to give the Berkowitz box the benefit of the doubt insofar as the lug covering one-half of the free margin section is concerned. I assert—and it can be measured if necessary—that this point where the lug terminates is half way between these two corners, in each case.

We have then put our diagonal fold from that intersection as shown in Berkowitz to the corner. I hope [335] that that is a clear representation to the jury.

We know that these boxes are supposed to be folded flat and delivered to a customer for quick erection. I want the jury to notice what happens when you fold on this line (folding and demonstrating with box).

Q. Could that box be folded flat or not?

A. Obviously the box could not be folded flat because here is your glue flap and here is your edge, and they come nowhere near one another.

Q. So that would have to be glued while in an open condition?

A. It could be glued up as a box in the set-up condition; yes, you could put it together this way so that it would make a box. But thereafter, if you ever wanted to re-collapse it, not having the 45 degree lines in the bottom section, you would tear

(Testimony of Ross A. Himes.)

it all to pieces. It would have to stay erected once it was put up. Well, people don't deliver folding boxes in a set-up condition. So I am inclined to rule this one out as being impractical. I will stop so far as this sample is concerned. [336]

* * *

Q. Mr. Himes, you had finished with this exhibit?

A. Yes. I had started on four samples I wanted to demonstrate for the Court and jury. I believe I had just about finished one but maybe a quick resume would conclude it.

It is the first of the alternatives that one would have in order to construct a box according to Berkowitz, showing the bottom sections attached to the long panels of a rectangular box. And I brought out that if the lugs thereon, on the free margins thereof, are made to extend from the center of that free margin section—a diagonal crease line is extended then from that point to the corners, that the angle is such that you couldn't possibly glue the box together in a flat condition. [338]

Q. Would that be an automatix box in the sense we are talking about then?

A. It couldn't possibly be an automatic box because it couldn't possibly be put together in a flat condition. I think that is clear.

Mr. Mellin: I offer that in evidence as plaintiffs' exhibit "U."

(Plaintiffs' exhibit "U" received in evidence.)

(Testimony of Ross A. Himes.)

Q. (By Mr. Mellin): Will you identify the next one by the letter on it?

A. This is exhibit "T"—plaintiffs' exhibit "T." Now the next in order I think should be this box—this sample—which shows the bottom portions or the bottom sections attached to the same long panels as we showed in the last sample—in order to complete that phase of it.

This is constructed the other one of two ways that this could be done as distinguished from the first sample that I showed you. This carries the diagonal crease line on both bottom sections so that it will be possible, when the box is folded, in preparation for completion, to have these glue sections on the ends thereof parallel with the bottom of the box. So [339] conceivably it could be glued.

That, of course, leaves us with the condition—when we do that now—running the lug extensions from that point of intersection—which you see here on Berkowitz and similarly in this sample—down to a tapered edge at the corner furthest from the bottom of the box.

Q. Where does that put the rounded end of the lug with respect to the center?

A. I am getting to that Mr. Mellin. What I was trying to explain first is that it makes this lug on the free margin considerably less than half of the free margin.

Q. Why didn't you make it longer?

A. There is a third way that this could be done. If you would employ the diagonal crease line which

(Testimony of Ross A. Himes.)

we must have in order to make the box fold into a box at all in the flat condition; and then if we want to still retain the lug section to cover one-half of the free margin—which would bring it somewhere up in here (indicating).

Q. So it would have to fold, too?

A. It would have to fold along this diagonal crease line with the rest of the thing, and of course then—when you started to try to open the box, you would have this lug bent over and forming a “V”—an upside down “V” [340] edge, two of them pressing toward one another in the middle of the box and it would be absolutely impossible to have them pass anything.

Q. Yes; thank you.

A. That I believe would clarify that point.

As I say, being that that would not work—and I believe it is easy to see that it couldn't possibly work—I have given the Berkowitz construction the benefit of the doubt, here, and have moved these points back to the point of intersection of the diagonal line.

Q. As shown in the Berkowitz drawing?

A. As shown in the Berkowitz drawing. All of these sections—features of the Berkowitz disclosure—you will see on this sample.

Now, I would like to demonstrate for the jury what happens when a box is made this way, just to cover the second phase of this demonstration.

When this box is folded as we have had called to our attention so many times, so that this section

(Testimony of Ross A. Himes.)

here glues on to the outside of this section, as shown in the progressive steps in Berkowitz, and this section is similarly folded inside of the box so that it will glue to the outside of the bottom section, the end joinder is glued outside or inside—probably outside would be just as well for the purposes of demonstrating. [341] And there we have a box (demonstrating).

Now I want to show the jury what kind of a box we have. I believe I can hold this all together in one piece while I am demonstrating it, rather than to have to glue it. Will the jury please notice the lugs in relation to the edges adjacent to them (demonstrating). Notice them approach one another, and notice that they are nowhere near one another. Obviously because it is not a square box, and because the lugs do not extend over one-half of the free margins of the bottom section; so nothing will happen. There is nothing there at all. So we don't have an automatic box, we don't have an inter-locking box.

Now as I say there is a third alternative. You could have arbitrarily made those lugs longer so they would have covered one-half of that free margin section but with this construction and with these bottom sections made in one piece rather than two, you would have to extend this crease line through the lug—if you made it any longer—thereby making it bend. And when these bottom sections approached one another you would have two corners—two up-

(Testimony of Ross A. Himes.)

side down "V's" of cardboard approaching one another and expect them to pass and inter-lock.

I believe we can dispense with this second [342] phase. Pardon me, there is one other thing while I have this in my hand that I would like to show the Court and the Jury.

Common practice in making this type of box, generally speaking, as we have seen demonstrated many times, is to create a double fold here with the bottom sections coming up and the other section folding back upon it into a bellows fold. Now, this may be a little tricky so please follow me.

The next thing that we have always required in this demonstration of this type of automatic box is for the end assemblies to be folded over upon the body of the box, and the ends joining at the same time.

I wish the jury would please notice what happens here in this Berkowitz box. If we fold this end assembly over on to the one next to it, that is not the section that it glues on. It doesn't jibe. It is off by two and a half inches.

At the other end similarly, when we fold the end assembly over on to the body of the box, what happens? It doesn't jibe. It doesn't fold on to that panel. It folds on to this one here. How can you fold that box—not by folding the end assemblies over on to the end of the box at all. The only way that this box can be folded is by hand, by taking the two right hand [343] assemblies or panels, folding them over on to the two left hand assemblies

(Testimony of Ross A. Himes.)

in this manner, and then finding some means of gluing this glue strip to the other end of the box and producing it in that manner. That supports my contention a while ago on the stand that there was not a machine of any kind in the folding box industry, to my knowledge, and I know all of them thoroughly, that is capable of making this box. It is almost an impossible procedure. I would hate the job of trying to invent or construct a machine for the purpose. Thank you.

Mr. Mellin: The model "T" identified by the witness is offered in evidence as plaintiffs' exhibit "T."

(Plaintiffs' exhibit "T" received in evidence.)

Q. (By Mr. Mellin): Will you go to the next, the third one?

A. All right. We have two down, and two to go.

We have covered both possible alternatives in attaching these bottom sections to the long panels in constructing a Berkowitz box that is rectangular. Now obviously we must go to attaching the bottom sections on the short or side or end sections of the box—the ones with the shortest width. You can see [344] this end is shorter than the other. We have placed the short panel on the left side.

Now, if the jury will please compare this construction with what is shown in the Berkowitz drawings. Obviously again we have a distance here equal to the distance that it is to glue to. Similarly

(Testimony of Ross A. Himes.)

here we have a distance that is similar to what we are going to glue to. That is necessary as is shown that by folding the bottom up in order to have a box at all you must have it. (Demonstrating.)

Now, we don't have true right angular sections like we had in the square box, and we run into trouble here. I have first to illustrate, giving the Berkowitz construction, the benefit of having its lugs extend along one-half of the free margin in both cases. I think that is a good place to start, because that is one of the things that shows in the Berkowitz box. I have then followed the Berkowitz disclosure by striking a crease line from that intersection or that center of the free margin to the closest corner in each case.

Q. Following the Berkowitz disclosure?

A. Following the Berkowitz disclosure as you see it.

Now, what happens? We start to fold this box up and make a box out of it. We fold this up and draw this [345] back (indicating).

We run into the same situation in reverse as we had on sample number 1. These point up-hill; the other pointed down-hill. There is no way that you could glue this and this and this to this.

Q. In other words, as I understand you, you couldn't have a glued together box in a collapsed condition?

A. You could not have a glued together box in a collapsed condition. I believe that that is plain.

Now to follow through on your questioning on

(Testimony of Ross A. Himes.)

sample number 1, Mr. Mellin, you could again glue this box together in an upright condition and make a box of it.

Q. Would it be a collapsible carton with an automatic opening?

A. No. It would have to be delivered as a set-up box to the customer and of course no one would do it. It shows a construction completely similar to what we see in figure 6 of Berkowitz, in that condition, except that it could not possibly fold back into the flat condition because of the absence of 45-degree lines.

That dispenses with three.

Q. That is what exhibit you are speaking of?

A. That is exhibit "R."

Mr. Mellin: I offer that in evidence, [346] your Honor, as plaintiffs' exhibit "R."

(Plaintiffs' exhibit "R" received in evidence.)

Q. (By Mr. Mellin): Now, will you take the next one?

A. In the last of these samples that are illustrating the different choices a person would have in following Berkowitz with a box that is longer than it is wide, it gives better opportunity or produces a better result than any of the three so far shown.

Q. Is this the one that is given the most chance of working of all of them?

A. This is the one that gives the most chance of working as a box at all.

(Testimony of Ross A. Himes.)

Q. That you could devise?

A. That I could devise, yes, sir. That is the reason that this box has been glued together rather than shown in a flat form first. After I demonstrate it to the Court and to the jury, I want to tear it down into flat form, too, and compare it so that you can see I am following the teachings of Berkowitz in making it.

Now, if the jury will notice, that has 45 degree angles, which allows it to be glued flat.

Q. Now, those angles don't run from the notch part to a corner; they run from some other [347] point?

A. They don't run from the notch part to a corner. In an extension here they would run on an exact 45 degree angle, the length of which would be the same as this line here.

Q. To make an isosceles triangle, so to speak?

A. Yes. That means of course that our intersection or our notch or our corner here—what is supposed to be the inter-locking point—does not coincide as it does in the Berkowitz drawings with the 45 degree angle. However, we have here what to all effects and purposes may be considered a box—a box that can be glued together and can be opened.

Now, this box has not been opened before—purposely. I didn't want it to be operated more than just this once—so without putting my fingers on the bottom, I am going to push it together for the jury (demonstrating with box). Now, we reach a

(Testimony of Ross A. Himes.)

point where we are almost to the closing position. Will the jury please notice these sections here that are touching one another—and butt up against one another; will they please notice that there is no means provided for directing those semi-circular portions past one another? I am trying my best to make this box work. I can't seem to get the inter-locking portions together, can I, so I give up and push it to the fully extended position [348] where you can see nothing is inter-locked with anything else. When you push on the bottom of that in that condition it comes right through the same as I showed you on the square box.

Do you want me to demonstrate that this could be made to work, Mr. Mellin?

Q. Go ahead.

A. I believe I could make it work if you wish. I am going to attempt to make this work because I know how to do it, having had some experience in this line. I am going to do the same thing that I did with the square box; I am going to bend these upward—in other words effect a crease in them by hand. Then as the box comes to the closing position, I am going to exert pressure with my fingers on this panel and on this panel so that I will make sure that this edge gets over the edge adjacent to it. Now, I believe that I can make this work (demonstrating). Yes.

Q. Would that be a satisfactory commercial operation, Mr. Himes?

A. Mr. Mellin, I believe the answer to that is

(Testimony of Ross A. Himes.)

obvious—it wouldn't be. We, in producing Parks boxes and Himes boxes have achieved the one objective of delivering to the customer something that is foolproof in operation, is positive in operation, that works every [349] time. These people packing on the end of a production line haven't time to bend tabs or push anything or distort it with their fingers. They must snap these boxes open and put the goods in and they are on their way. I believe I can take this box away and show the jury that it conforms to the Berkowitz construction.

Mr. Smith: Before you do that may I examine the box? May I ask a couple of questions?

Mr. Mellin: Oh, certainly.

Q. (By Mr. Smith): The box is set up?

A. It is set up, now.

Q. It will not collapse either with pressure from here or pressure from here?

A. I don't make too much of a point of that, Mr. Smith. I will grant you, if you wish, that once this box has been inter-locked by the means I just showed, it is set up; it will resist against re-opening. If that is what you wanted, you may have it, sir.

Q. Thank you.

A. While the box is in my hand I believe, too, it would be constructive before I tear it apart, to show the jury something that was brought out the other day by Mr. Thom on the stand. Mr. Thom pointed out there was a tendency in a box of this kind without any overlapping in the bottom sec-

(Testimony of Ross A. Himes.)

tion—I will see if I can [350] do this without sitting down—to form a spread here in the corners. As the goods was placed into the box, the box opens up in the corners is what I am trying to illustrate. Can you see what I mean? There is no over-lap—there is no positive guard against the material falling through it.

Well, I will take this apart because I do want to prove that it is made according to these disclosures, and that will be the last of my four samples (taking glued portions apart). All right. I think there we have it so that I can show what I mean. That shows the fourth alternative. Notice that these end panels are—those with the least width; the opposite panels are wider giving us a rectangular shape; the bottom extends down so that this is equal, to conform to this edge in both cases.

The 24 degree angle is included, here, but in order to make the box even inter-lock the hard way, we had to leave those semi-circular lugs at the 50 per cent point or half way along the free margin. That doesn't of course make it conform exactly to Berkowitz because in order to conform exactly to Berkowitz they would have had to be up here and then there would be no way in the world of making them inter-lock. They would be past center, you see. There again the only possible [351] chance a person would have of making this on a machine would be to take the two right hand panels and then seam this. Because it will be seen that this panel does not over-lap this one at all. This one works on this

(Testimony of Ross A. Himes.)

one. This one when it comes over won't fold on to the one adjacent to it; it folds on to the one on the other end. I just wanted to bring out that difference because there is a tremendous difference.

Mr. Mellin: I will offer that model just testified to by the witness in evidence as plaintiffs' "S."

(Plaintiffs' exhibit "S" received in evidence.)

Q. (By Mr. Mellin): To your knowledge, has any one commercially made a box such as shown in Berkowitz?

A. To my knowledge, there never has been one commercially produced.

Mr. Mellin: That is all.

Redirect Examination

By Mr. Smith:

Q. Just so there can be no misunderstanding, Mr. Himes, in each of these models which you have just been testifying about is it not true that this crease line extends and meets the notch? [352]

A. On each of the samples?

Q. Yes.

A. On each of these two samples?

Q. Yes. A. Yes.

Mr. Mellin: Which ones are those?

Q. (By Mr. Smith): Here is the identifying letter—"T" and "R"? A. Yes.

Q. For the purposes of the record the models

(Testimony of Ross A. Himes.)

you were speaking about are plaintiffs' exhibits "T" and "R," is that right?

A. "T" and "R," yes, I guess so. I know this one is "R." The other one is "T," yes—"T" and "R."

Q. Now, the same thing is true of this exhibit "U"; the diagonal creased line from the corner intersection with this notch that must lock?

A. Yes; this is the one that won't fold together.

Q. That is right. But in that instance and in each of these other instances it extends from the——

A. Yes. They have been made purposely so that the lug covers half of the free margin, and the diagonal extends from that halfway point to the closest corner.

Mr. Mellin: Which is that last exhibit; what is the exhibit number you referred to? [353]

The Witness: It is Exhibit "U."

Q. (By Mr. Smith): Because the black on white is easier to read, I am handing you a copy again of the Parks patent.

A. All right, Mr. Smith.

Q. And I call your attention to the language of claim 2, particularly that which refers to the crease line, beginning on page 3, the left column, in line 59.

A. "The two elements of each section being permanently connected and being creased on a line permitting folding thereof to correspond to the folding of the associated side walls." Is that what you wanted?

Q. That is enough; no more.

(Testimony of Ross A. Himes.)

A. That I did with two samples.

Q. Does that say 45 degrees?

A. No; but it would have to be 45 degrees in order to conform.

Q. I think we can grant that is a necessary limitation?
A. Yes.

Q. Does that say where that creased line extends; in other words, where it originates and where it ends?

A. We started on line 59, did we not?

Q. Yes, that is right; line 59 in the left column.

A. "The bottom sections being provided with inter-engaging locking means, being creased on a line permitting folding thereof." I believe that is the only reference, [354] isn't it?

Q. I believe you will find that is the only reference.
A. All right.

Q. That creased line, then, can extend as it does in Parks from the corner "16" out to the free margin and need not necessarily intersect the bottom of the notch; is that not correct?

A. That is true. It need not necessarily intersect the notch.

Q. Then that language you say covers a situation where the crease line does not intersect the notch?

A. You are speaking of Parks, now, sir?

Q. Yes, sir; the Parks claim, too.

A. I have been following Berkowitz in making these samples.

Q. Oh, we are not talking about the samples—we are talking about the patent.

(Testimony of Ross A. Himes.)

A. Oh, pardon me.

Q. That language that you have just read with respect to the creased line—except that we admit that the angle with respect to the corner from which it originates has to be 45 degrees—no other necessary limitations as to where it ends exists; is that not correct?

A. That is true. It would depend upon the shape of the box. [355]

Q. If it extended from the corner “16” to this notch, it would not be a 45-degree angle, would it?

A. It wouldn't be made that way because it wouldn't conform.

Q. It wouldn't work, in fact, would it?

A. No, it wouldn't work.

Q. It would have to be 45 degrees?

A. Right—let's say approximately 45 degrees.

Q. Yes, approximately 45 degrees. Now, the location of that notch on one section which locks with a notch on the other always has to be in the center of a carton at its intersection, does it not?

A. In order to make the box work, yes.

Q. Yes?

A. Excuse me, I want to qualify that. I have seen boxes made where it was not in the center. As I said this morning, my answer was a little too quick. It so happens that in this disclosure of the Parks patent and the drawings and so on it is carried in the center, but not necessarily so.

Q. Now, that creased line which we say must

(Testimony of Ross A. Himes.)

start in this corner, then, need not end at the locking notch, need it? A. It need not.

Q. It may just extend from a 45-degree angle from that [356] corner (indicating)?

A. It must.

Q. And where it strikes the free margin of the bottom half is a pure matter of construction, is it not? A. It is immaterial in the Parks box.

Q. It will work out that if you start out from a corner at 45 degrees it may be more or less than an inch, maybe, from the locking notch on ordinary cardboard?

A. Yes, I say on the Parks box it is immaterial.

Q. As a matter of fact, this box of Exhibit "S" which you had here—it came close to working—you had to force it, but it came close to working?

A. I could make it work, yes.

Q. The 45-degree angle does not coincide with the notch does it?

A. No; although it does in the Berkowitz disclosure.

Q. It would have worked a little easier had that notch been set off to one side a little farther?

A. No. It is in the exact center.

Q. Oh, it is in the exact center? A. Yes.

Q. Would it have worked a little easier, possibly if the proportion you adopted to this wall here might have been a little less than its relation to this?

A. If you are trying to say that the sample is inaccurately [357] made, I challenge you, sir. It is made exactly.

(Testimony of Ross A. Himes.)

Q. I am not saying inaccurately made. I am talking about the various possibilities. How did you arrive at this proportion shown between the longer and the shorter portion?

A. I used a Nalley's Potato Chip box on the first two and conformed to it with the other two.

Q. How long is that longer wall?

A. Nine and a quarter inches.

Q. And the shorter wall?

A. Seven inches.

Q. And that is the same proportion——

A. On all of the samples.

Q. ——on all of the samples? A. Yes.

Q. However, if that had been a little narrower wall, more in the proportion of Parks of about two to one, shall we say? A. I don't recall.

Q. Well, you can see it there (indicating patent document)?

A. I would say two to one. That is as good a figure as any.

Q. It is not nine to seven is it?

A. No. [358]

Q. If it had been a little narrower, this lug that the bottom section is attached to had been narrower, the angle would have been steeper, would it not?

A. Oh, yes.

Q. And the intersection of this crease line would have been probably farther away from the notch?

A. Away from the center, that is right.

Q. As Mr. Chadwick showed yesterday, when

(Testimony of Ross A. Himes.)

he actually cut up this box which was a locking bottom box and it did lock, didn't it?

A. I was not here during that testimony.

Q. Oh, I beg your pardon. Have you examined this? A. I would like to examine it.

Q. Would you like Mr. Chadwick to demonstrate this point?

A. I can see what he was attempting to do.

Q. What was he attempting to do?

A. He was attempting to show that he can cut up a Parks box or a Himes box and produce some similarity to a Berkowitz construction, no doubt.

Q. Rather a marked similarity, isn't there?

A. Well, now, if you are going to ask me that would you mind letting me see it, sir, and telling you what similarity I see?

Q. No; you go right ahead.

A. All right; let's take a look at it. (Takes unfolded box [359] and inspects same). Similarity and differences. I think that my first observation would be—it is more or less a casual observation—on the Berkowitz disclosure these bottom sections are shown affixed to the left hand end wall, and the alternate wall of equal width. Whereas in this sample here they are attached to the other two. That may not seem like too much of a point—just with a casual observation—but it is an important point for this reason, Mr. Smith—that this then having been cut from a Parks box with those panels on the extensions of the opposite sidewalls as you see them here would allow your end assemblies to

(Testimony of Ross A. Himes.)

come over and make a box on a folding and gluing machine; whereas this disclosure in Berkowitz, you couldn't possibly do it.

Q. What would you have to do to make it work that way?

A. You would have to transpose them, first, on to the panels on which you see them here in Mr. Chadwick's cut-down sample.

Q. What you are really saying is that the wall "A" attached on the right end needs to be on the left end, is that right?

A. That would be one way of saying it; with of course the glue flap also attached to it. I would rather say that if this one on the left were transposed over to [360] the right and then the glue flap were moved to here. Of course, these things—when you get into this kind of a discussion it becomes confusing because if you take a disclosure—something that is disclosed—and you say this is the same as that and then you begin altering that disclosure with this, that and the other thing—always in the direction of Parks it seems to me—you no longer have a Berkowitz disclosure. That is the point I am trying to make, here.

Q. Then the only difference is whether or not that wall on your left——

A. I didn't say.

Q. The primary difference is whether or not the wall on the left end is there or if it is over on this end of the series?

A. That is one of the differences. I wouldn't

(Testimony of Ross A. Himes.)

say it is the primary difference. Let us say it is one of the differences.

Another one here that we see that is obvious is that we do not have this lug extension on these panels extending along one-half of the free margin which we have in Parks in diagonal boxes. It does not extend along one-half of the free margin and couldn't in order to work. It must extend considerably below [361] the halfway point, as I illustrated in my sample number four. We have the 45 degree angle so that the box could be glued together. But we have this lug section in both cases considerably less than one-half, meeting in the center of the box, as it is closed—but the lug portions will not conform.

We have here of course a broken line instead of a straight line from this corner to the point of intersection, simply because it was impossible in cutting down this box to keep it straight. That is unimportant except that if this box were put together as it is cut you would have a lot of holes in it. If you opened it, it wouldn't be a complete closure of the bottom.

Q. The contents could fall out or dust could get in, is that correct?

A. Yes; and once it is started—it is like tearing a piece of cloth—once it is started, you might as well give up. I don't know whether I have to go any further on this, do I?

Q. The exhibit we were speaking of was defendant's exhibit "14," was it not? A. Yes.

(Testimony of Ross A. Himes.)

Q. With this ruler, will you lay it from one corner or tip of this bottom portion to the nearest wall on a diagonal and tell us what the readings are? [362]

A. What do you want me to measure, Mr. Smith? Where do you want me to start? At what point?

Q. To simplify matters, do you see this notch we are talking about right here? A. Yes.

Q. If we drew a line out from that notch and mark it with an "X"?

A. Then we have nine and a half inches, do we not?

Q. Over-all length?

A. Over-all, yes.

Q. From this corner to the notch, how long?

A. Four and three-quarters inches half way.

Q. What is two times four and three-quarters?

A. Nine and a half.

Q. Then does the lug extend one-half the length or does it not?

A. It does. I must have been in error on that.

Q. Now let us turn to claim 5, on the right hand column of page 2.

A. Don't you mean page 3?

Q. I beg your pardon; yes sir, page 3. Do you see in line 55,—let's go back just a little bit. Let's go back to line 52 where the words "Each section" begin and read from there on.

Do we agree that the word "section" is talking about [363] a half of a bottom section?

Mr. Mellin: If your Honor please, we have gone

(Testimony of Ross A. Himes.)

through the claims on Berkowitz this morning. We didn't go through them again on Redirect. I don't see why we have to go over the claims on Berkowitz with Counsel pointing them out. We will be here forever.

Mr. Smith: I don't think so, sir. The point will take just a couple of questions.

The Court: Go ahead.

Q. (By Mr. Smith): When we speak of the word section we are talking about this bottom section, are we not?

A. All right; let's say we are talking about the bottom section.

Q. Starting on line 52, with the words "Each section" will you read that?

A. "Each section being hingedly connected at two edges to the bottom edges of two adjacent sidewalls and being creased for folding on a line extending across the section from a point adjacent the hinged connection between the two sidewalls to which said section is connected, whereby said section may be folded into planes parallel with said sidewalls when the carton is collapsed. The free margin of said sections being formed with similarly shaped,"—— [364]

Q. I believe that is enough. We just want to get at that word "creased" in there. Do you remember it as you read it? A. Yes.

Q. It extends, does it not, from pointing to figure 1 of Berkowitz, the junction between the walls "C" and "B" outward at an angle? A. Yes.

(Testimony of Ross A. Himes.)

Q. We are agreed that the angle has to be 45 degrees?

A. Yes, sir, Mr. Smith; it must be 45 degrees or you can't get a box.

Q. We agree that if it intersects the notch,—we agree that if it intersects the notch it would be within the term of that claim, do we?

A. If it what?

Q. If it intersects.

All right. We agree that if it does not intersect the notch it would be there, don't we; that is the term of the Parks patent; and it does not intersect here in figure 6 of the Parks patent, does it?

A. No.

Q. The language is broad enough to cover it not intersecting the notch, isn't it?

A. Yes; it would have to be. The angle must be 45 degrees,—square or oblong. [365]

Q. All right. In the square box it is going to intersect the notch, isn't it?

A. That is true.

Q. In the rectangular box it is not?

A. That is right.

Q. And does it make any difference whether it intersects the notch in these models we are talking about down here?

A. In Parks, no,—but we are looking at a disclosure of Berkowitz. I have given you four things this morning that you never saw before, Berkowitz or any place else.

Q. I didn't intend to argue with you, sir. I am sorry that I have.

Mr. Smith: That is all.

The Witness: Thank you.

(Witness excused.)

Mr. Smith: I would like to recall Mr. Carl Thom. [366]

CARL THOM

recalled as a witness, previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Smith:

Q. I believe, Mr. Thom, you testified you have been in the box industry since approximately 1916?

A. That is right.

Q. And that that has been your principal business since that time including work as sample making and machine operation of various types in box factories?

A. That is right.

Q. Do you see on Defendant's Exhibit "17" the red line that extends in sort of a zig-zag manner from end to end in the middle of the carton?

A. Yes, I see it.

Q. And that that marks out various nesting parts?

A. Yes.

Q. And this outside of that line and those parts marked out there is a series of walls on each side?

A. That is right.

Q. How long has that particular construction been used in the business, to your knowledge?

A. Well, to my knowledge—I have been in it for 34 years and it was in vogue then when I came

(Testimony of Carl Thom.)

into it. [367] How long before that or prior to that, I couldn't say.

Q. It is an economic practice that you know of?

A. That is right.

Q. It is an economic practice, isn't it?

A. Yes, that is right.

Q. And this Exhibit "18," which I hand you and call attention to the red line running down the center, separating the parts, does that practice or that manner of constructing blanks appear to you to have any novelty in the center there at all?

A. No novelty, no. That is customary like I said before—before my time; because the dies we run when I went to work in '16 were run like this.

Q. In 1916?

A. Yes. How far before that, I couldn't say.

Mr. Smith: Thank you. That is all we have to ask at this time.

Do you have any questions?

Mr. Mellin: No.

(Witness excused.) [368]

V. B. CHADWICK

the defendant, recalled, and previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Smith:

Q. This is Defendant's Exhibit "14," Mr. Chadwick. I believe that you will recall that just before

(Testimony of V. B. Chadwick.)

lunch yesterday you cut it up into the form in which it is now found, is that not right?

A. That is right, yes.

Q. Would you hold it up again and tell us: Did you demonstrate that when those waste parts had been cut off that that bottom lug was locked, or not?

A. Yes; that was one of the principal points that I tried to make yesterday, that this waste material that was in here was not contributing to it, and that the box itself was a fully locked box and could be re-assembled in this form. I believe it has been stated that this box could not be made on known machinery available on the present market. We can make this on the machines now in our factory. We can make them on machines at the rate of about six thousand to seven thousand an hour, with a make-ready of about eight hours. In order to prove that myself last night I spent quite some considerable time in our factory to be sure I was [369] right. I would be willing to take the Court or anybody who wishes to see it down to show it to them.

Q. In holding that up did you apply pressure in such a manner before you finally pulled it apart so it should have collapsed had not those parts inter-locked?

A. I fail to follow your question.

Mr. Smith: We will withdraw that question, Mr. Reporter.

Q. (By Mr. Smith): Do you recall that after you had cut out that waste material you held the box up in such a manner to the jury?

(Testimony of V. B. Chadwick.)

A. Yes; after I had removed the waste material before we made it in the flat pattern, I held it up to the jury—as you probably remember—and collapsed it and locked it. It held its lock and couldn't be disengaged either upward or downward unless it was twisted on the inside. Inside twisting it on the inside tore the little lock.

Q. It tore the lock slightly? A. Yes.

Q. And that was before the waste material was cut off?

A. Before the waste material was cut off.

Q. Again with Exhibit "16," did you make a similar demonstration to that effect?

A. Yes. We tried it on both of them and in effect the [370] same situation developed on both of them. It is difficult to start with a pattern of a box of one style and carve it up to make another style box out of it. But I believe it is possible to do so and in a crude manner demonstrate the situation. When you start to make a crude box with the craftsmanship that is available to you, you can do that.

If you will notice, yesterday, at this same point—there has been quite an issue made here today about whether that is a true circle there or whether it is square or pointed. In our Berkowitz patent we are taught there is a lug. He drew it round. He could just as well have drawn it square. Like yesterday, I chopped off a piece of it. There is no point in it. It could be in several different forms. We could make a little triangle out of it if we want. In the Parks patent, whether the circle is large

(Testimony of V. B. Chadwick.)

or small depends on the construction of the box and how fast you want the lugs to engage with each other. But as far as it being a pertinent point in the patent or in the drawing, there, it is not. It is just there to illustrate the type of mechanism—not to give you a dimensional situation.

To substantiate that, may I have the Berkowitz patent to read, please? [371]

Q. (By Mr. Smith): Exhibit “4” (handing document to the witness).

A. I am reading from this Berkowitz patent on—it looks like line 54.

Q. What page and what column, please?

A. There is no number on the page. It is the first page here where it says “United States Patent Office.” It says here, “Referring now more specifically to the drawings which are to be interpreted as illustrative rather than specific scenes.” Right in his own drawing where he has attached the drawing to it he says that. “Referring now more specifically to the drawings which are to be interpreted as being illustrative rather than a specific sense, I have indicated a box having four rectangular sides.” He doesn’t mean that we are to get down to minute differences down here.

Mr. Mellin: If your Honor please, I think we are getting to the point where perhaps the witness is arguing the case a little too much.

The Court: That has been true with several different witnesses.

(Testimony of V. B. Chadwick.)

Mr. Mellin: I mean now we are making speeches.

The Witness: May I read one other point in the patent? [372]

Mr. Smith: Yes.

A. (Continuing): When I carved this box up we started with an oblong box and I cut it up. It was a locking box and it can be made to be locked again. This particular drawing of Berkowitz shows a square box but the intention of the patent was not to confine it to a square box.

The Court: Yes, that is objectionable.

Mr. Mellin: If your Honor please, he is now giving intentions and I think he is going a little too far.

The Court: Yes.

A. (Continuing): May I make the statement then, that the boxes we had here are of an oblong nature and can be made according to the patent. I will read the patent.

Q. (By Mr. Smith): Yes.

A. "The aforesaid description of a bottom wing structure of isosceles form will be understood as being pertinent only to that form of a box in which the bottom is substantially square. The construction moreover is equally applicable to box bottoms of oblong as distinguished from square construction but the manner of manufacture and manipulation will be in all cases practically the same." That is what we intended to do in making the oblong [373] boxes.

The Court: Is there any other examination?

Mr. Mellin: No, your Honor.

The Court: That will be all.

(Witness excused.)

The Court: Any rebuttal?

Mr. Mellin: Plaintiffs rest.

* * *

Mr. Mellin: If your Honor please, I neglected offering Exhibit "Q." Counsel has stipulated it may be received in evidence.

The Court: Very well. It will be [374] received in evidence. [375]

* * *

The Court: Well, in a situation such as this where the Court is rather uncertain as to the legal effect of the statement made by the plaintiff, I would deem it proper to deny the motion with the thought in mind that the verdict be against the movant. He can then move for a judgment notwithstanding the verdict. Then should I agree with the defendant, and on appeal—the Court on appeal disagrees with me—they could reinstate the verdict without the necessity and delay and expense of another trial.

So I am going to deny this motion with the thought that we would be very happy to hear from you on a motion for a judgment notwithstanding the verdict.

Gentlemen, I was going to discuss with you the matter of these instructions. [386]

* * *

The Court: Now getting down to these instructions—counsel have them before them. There are certain instructions proposed to which defendants have made no objection so I will give those or their substance. [391]

Mr. Smith: Excuse me, your Honor, before we get too deeply into that—I didn't realize you were going to move to them immediately. I wish to make a motion for a directed verdict in favor of the defendant on these four issues involved here.

The Court: For the same reason that I have noted before, I am denying your motion for a directed verdict upon these different claims and your defenses with the understanding that if you have an adverse verdict against you, you may take the course that is allowed to you.

Mr. Smith: Thank you, your Honor. [392]

* * *

The Court: Ladies and gentlemen, you have either heard or seen all of the evidence which will be before you in the trial of the case. That evidence consists of the sworn testimony of the various witnesses who have testified and the documentary evidence which includes all of the exhibits which have been received by the Court. Upon that evidence and upon that evidence alone you are to arrive at a verdict if you can conscientiously do so. In the trial of a case you, the jury, and I, the Judge, are what we might term a team in the judicial process in the Federal Court. You have the exclusive function to determine the issues of fact. I have the exclusive function of determining the principles of law which

are to govern you. I am about to give you those instructions. I have not intended to intimate and neither do I intend to intimate in these instructions how I feel you should decide this case. I intend—as far as I possibly [393] can—to refrain from any intimation along that line to you because I feel that this is a case which you should decide upon the facts without any assistance from the Court upon the Court's factual views.

“A patent is a grant by the United States, under authority of the United States Constitution, to a private person of the right to exclude all others from the manufacture, sale and use of a particular invention for a period of seventeen years in exchange for the disclosure of that invention to the public.”

Pursuant to Constitutional provisions, Congress has created the Patent Office to issue letters patent establishing the exact boundaries of the exclusive rights granted and has established seventeen years as the life of a patent.

This is an action for damages for patent infringement.

Plaintiffs claim that the defendant has infringed two patents owned by the plaintiffs by using them in its manufacturing operations, processes which embody the patent inventions. They seek damages for infringement.

The defendant has attacked the validity of [394] both patents, and has admitted infringement of claims 2 and 5 of the Parks Patent, No. 2,011,232, the only claims of that patent in issue here, if either or both of said claims are found by you to be valid.

Defendant has denied infringement of claim 1 of the Himes Patent, No. 2,243,421, the only claim of the Himes patent in issue here.

U. S. Patents Numbers 2,011,232 and 2,243,421 were granted under an Act of Congress which provided for the issue of a patent to any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof or more than two years prior to his application for a patent, and not in public use or on sale in this country for more than two years prior to his application for patent.

When the owner of a patent sues another for the infringement of the exclusive right which his patent grants, there are four ultimate facts which must be [395] established by satisfactory evidence under the applicable law for him to recover. They are, first, that he is the owner of the patent and has the right to maintain an action for damages covering the entire period of infringement complained of. Second, that his patent is valid. Third, that the acts complained of were committed by the defendant and do infringe the patent and, finally, that he has been damaged by that infringement and the amount of such damage.

In view of the fact that defendant has admitted that the plaintiffs are the owners of the two patents

in suit, you do not have to decide such question. In view of the fact that defendant admits that if the Parks patent Number 2,011,232 is valid that he has infringed the same and that the damages shall be \$1,500, you only are required as to the Parks patent to determine one question, namely, whether or not the same is valid.

In respect to the Himes patent Number 2,243,421 the defendant has admitted in addition to the title in plaintiffs the amount of the damages in the sum of \$100. Thus, there is in issue here both the validity of the Himes patent and infringement thereof.

Defendant, by his pleadings, puts into [396] dispute the existence of the following prerequisites to validity with respect to all the patents in suit: Originality, novelty, invention over the prior art, sufficiency of disclosure and definiteness of claim, and, therefore, on the question of validity, these are the only matters that require consideration.

If you find that any single one of these requisites is lacking in either claims 2 and 5 of the Parks patent Number 2,011,232, then you must find for the defendant as to such claim.

The Patent Office, in granting the patent in suit, determined the existence of all prerequisites to validity in favor of plaintiffs, and the grant of a patent by the Patent Office creates a *prima facie* presumption that the patent so granted is valid and enforceable. This presumption of validity, standing **alone**, is sufficient to discharge plaintiffs' burden of proof with respect to validity of the patents in suit. It is necessary for a determination that the

patents or any of them are invalid for the defendant to overcome this presumption by producing clear and cogent evidence to show that one or more of the essentials of a valid original patent is, in fact, lacking in each patent it attacks. [397]

I come now to the matter of invention: Our patent laws require that a valid patent claim should describe an invention which is both new and useful. If it does not, that claim is invalid or void. If the claim does accurately describe something which was invented and which was new and also useful, then the patent owner has a seventeen-year monopoly of the manufacture, use and sale of the invention described by such claim.

Invention is to be distinguished from workmanship of a good mechanic or engineer, skilled in the art. It is the exercise of a talent that sees something that has not been seen before.

The exercise of mechanical skill which does not amount to invention is embraced in such common expressions as "expected skill of the calling" or the "skill of the art." With the rapid advance in science and technology the level of expected skill in many fields is constantly rising. Knowledge of the prior art is not limited to the knowledge of the public generally, nor to those who carry on routine work in a complex and technical field; but it embraces that knowledge of experts, scientists, and trained engineers who have been working in the art.

Invention is the double mental act of discerning some deficiency or need and pointing out or [398] finding the means of overcoming it.

The prior art patents to Cramer, 1,662,698; Filmer (British), 345,682; Creasey, 1,679,710, and Berkowitz, 1,700,733, were before the Patent Office during the prosecution of Parks Patent 2,011,232 and were rejected by the Patent Office as disclosing the invention of said Parks patent. Therefore, the presumption of novelty and invention which arises from the grant of the patent is strengthened.

With respect to originality, the law requires for a valid patent that it be issued to the original inventor or inventors of the invention claimed. The Patent Office, by the issue of the patents in suit, has determined that the inventor recited in each of them was, in fact, the original inventor of the subject matter claimed therein, and this raises a *prima facie* presumption of originality which can be overcome only by clear and cogent evidence to the contrary.

With respect to novelty, the law requires for a valid patent that it be issued to the "first inventor" of the invention claimed. [399]

A "first inventor," as a matter of law, is a person who has invented or discovered the subject matter claimed before that subject matter was known or used by others in this country and before it was patented or described in any printed publication in this or any foreign country.

A prior patent or prior printed publication which will prevent an original inventor from being, at law, a "first" inventor may have been in this or any foreign country and must set forth a construction in a complete enough form to accomplish the

result accomplished by the claimed invention in substantially the same way. It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question.

Because the Patent Office, in granting the patents in suit, has determined that the inventions thereof were in fact first invented by the inventor or inventors recited therein, there is a *prima facie* presumption that the patents in suit satisfy the requirements of law. If the evidence presented by the defendant on the question of novelty does not go beyond that already [400] considered by the Patent Office, then the presumption of validity from the grant of the patent is strengthened and there must appear some very clear and cogent reason for differing with the Patent Office in its conclusion that the subject matter of the patents in suit was novel. In order to overcome the presumption of novelty, the defendant must prove an anticipation of the claimed invention.

With respect to either of Parks' claims 2 and 5, if you find that either claim thereof, when read in view of the elements and structure of the Berkowitz patents and its drawing, existed in the Berkowitz disclosure, you are to find such claim invalid.

The question whether an invention is new divides itself into two branches: First, was it anticipated, that is, was the same thing disclosed in an earlier patent or printed publication or had the same thing been known or done before; second, if the same thing was not patented or described or known be-

fore, were there other devices or processes so nearly like the one described in the claims of these patents that it needed no inventive ability, no exercise of inventive genius, to make the device or process which the patent [401] claims describe, but any person skilled in the art would naturally have made such changes?

As to the first branch, anticipation means the existence in the prior art—that is in previous patents or printed publications or within the knowledge of others in this country—of a thing substantially identical with the thing or things described by the claims of the patent in question. If a prior patent or a prior printed publication discloses, or if someone in this country knew of substantially the same thing which will perform substantially the same result in substantially the same way by substantially the same means, there is anticipation; the latter device or process is not patentable.

Patentable invention may exist in combining old elements in a new way so as to produce an improved result.

It is for the jury to determine, from all of the evidence in the case, whether mere mechanical skill or the exercise of the faculty of invention was required to produce the combination desired by each of the claims of the patents in suit.

With respect to utility, the law requires for [402] a valid patent that the subject matter which it claims be useful. An invention is useful within the meaning of the law if it is available for any use which on the whole is beneficial to the public. From

the grant of the patent by the Patent Office there is a presumption that the claimed invention possesses utility.

With respect to invention, the law requires for a valid patent, not merely that the claimed subject matter shall be new and useful and original work of the recited inventor, but also that it shall have required the exercise of the inventive faculty. The law does not intend a patent to be granted for every shadow or shade of an idea, but equally it is a purpose of the patent law to encourage worthwhile advances by the granting of the exclusive right to those advances. Thus, an advance does not involve invention and is unworthy of a patent if it is such an advance as requires no more than the customary skill of the art to which it relates.

The question of invention is a question of fact to be decided by the jury upon consideration of all of the evidence. If, on such consideration, the [403] jury believes that each of the patents describes and claims an advance which was, in fact, inventive, it should decide this issue in favor of the plaintiffs, otherwise, you should decide this issue in favor of the defendants.

In order to obtain a valid patent, an inventor must file in the Patent Office, in exchange for the exclusive right he is to receive, a written description of his invention, and of the manner and process of making, constructing, compounding and using it in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly

connected, to make, construct, compound and use the same.

The law requires, for a valid patent, that after making his full, clear and concise description, an inventor shall particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery. It is the purpose of the claim to mark off the metes and bounds of a patentee's exclusive rights. The claim, not the specification, measure the grant to the [404] patentee.

The defendant can overcome the presumption of sufficiency of disclosure only by clear and cogent evidency of insufficiency.

The question involved in evaluating the definiteness of a claim is whether the terms of a claim otherwise meeting the requirements of law do, or do not, have definite meaning and, therefore, are, or are not, satisfactory for the purpose of apprising the art to which they relate of the limits of the rights granted by them.

Testimony as to the definiteness or indefiniteness of the technical meaning of the terms of a patent claim by experts in the art to which the claim relates is evidence on this point.

There is no issue as to the infringement of the Parks Patent Number 2,011,232 because defendant admits infringement thereof.

However, as to infringement of the Himes Patent Number 2,243,421, you are instructed that infringement is the invasion of the patentee's right to exclude others from the use of his invention during

the seventeen year term of the patent. Infringement is to [405] be found when the accused operation accomplishes substantially the same result by substantially the same steps as set forth in claim 1. Thus, if defendant, in its operations has substantially adopted the principle of claim 1 of Himes' patent to accomplish the same purpose, he has infringed. In determining the question of infringement, which is a question of fact for the jury to decide, the jury is to look at the operations in the light of what is done and how it is done. Variances which are insubstantial, which do not prevent the accused operations being in essence the same as that claimed in the patent, do not avoid infringement. Further, infringement is to be found if the accused operation is the substantial equivalent of the subject matter as claimed in the patent, and, where the patentee has made a substantial advance in the art, he is entitled to a broad and liberal range of equivalents and where the advance is not substantial then the patent is entitled to only a narrow range of equivalents.

The burden of proving infringement rests upon the plaintiff, and plaintiff must prove infringement by preponderance of the evidence. Therefore, if you find that the evidence on this issue shall be [406] equally balanced, in other words that the scales of proof hang even, then your verdict must be for the defendant.

To find infringement of a claim, that claim must be construed consistently with the patentee's actual

achievement and advance over the prior art, and to find infringement, you must find that there has been appropriation by defendant of that achievement or advance over the prior art.

If you find that the method of manufacturing cartons by the defendant embodies the method claimed by claim 1 of the Himes patent 2,243,421, even though there is a departure from the drawings of the patent by the defendant's method to the extent of changes which would be readily conceived and made by a mechanic in the course of manufacturing cartons in accordance with the disclosure of the patent, then you should find infringement.

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors. And you [407] should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

The counsel in the case have agreed upon a form of verdict. Since the issues have been narrowed and simplified by the stipulation heretofore filed

by counsel in the case, the counsel have agreed that what is termed in law as special verdicts will be handed to the jury or will ask be returned by the jury.

I am going to read the special verdicts that they have agreed upon,—I mean the form of the verdicts that they have agreed upon and then will briefly refer to the method which you should,—when you reach verdicts fill out the forms.

“We the jury in the above-entitled cause find,”—and there are four findings to be made,—1, “claim 2 of the Parks patent number 2,011,232 is,”—and then opposite that two words,—“valid and invalid.” 2, [408] “claim 5 of Parks patent, 2,011,232 is,”—likewise, “valid or invalid,” “Claim 1 of Himes patent 2,243,421 is,—infringed or not infringed. Claim 1 of Himes patent 2,243,421 is,—valid or invalid.”

Now, you will note as to claim 2 and claim 5 of the Parks patent and claim 1 of the Himes patent, after each one of those special verdicts appear the word “valid,—invalid.” You are to draw a line through the word which does not express your verdict. And therefore if you should find claim 2 of the Parks patent valid, just draw a line through the word “invalid.” As to claim 5, which is the number 2 special verdict, should you find that claim to be invalid you will cross out the word “valid.” And of course, as to the claim 1 of the Himes patent upon the question of infringement, if you find that it was infringed, cross out the word “not infringed.” And if you find that that patent was not

infringed, obviously you will cross out the word "infringed."

I hope that you all understand that.

Upon returning to your jury room you will first select one of your number to act as your foreman or forelady, whichever the case may be, and it will be the duty of one whom you so select to act as your spokesman in any further proceedings in this case in [409] this court. After you have retired to your jury room you may send for any or all of the exhibits which have been received in evidence in the case.

There is one final admonition the Court wishes to give to you. It is this: When you come to the Courtroom, if you happen to come here for any purpose whatsoever, you are not to divulge to the Court in any manner how you are guided numerically or otherwise upon the matter of verdict or verdicts; and that admonition I ask that you observe at all times until the jury has reached a verdict. [410]

* * *

The Court: The record will show that the jurors are all present.

Members of the jury, have you agreed upon a verdict?

The Foreman: We have, your Honor.

The Court: I believe I neglected to inform the jury that in the Federal Court it takes the unanimous vote of a verdict?

The Foreman: That has been done, sir.

The Court: Very well; if I may see it (verdict handed to the Court).

The Clerk will read the verdict.

The Clerk: Addison N. Himes and Ross A. Himes, individuals doing business under the firm name and style of NoloX Company of America, plaintiffs, versus V. B. Chadwick, an individual doing business under the firm name and style of Coast Carton Company, Civil Case number 2092, Special Verdicts. "We the jury in the above-entitled cause find, 1, Claim 2 of Parks [418] patent 2,011,232 is valid; 2, Claim 5 of Parks patent 2,011,232 is valid; 3, Claim 1 of Himes patent 2,243,421 is infringed; 4, Claim 1 of Himes patent 2,243,421 is valid.

"Signed, Henry J. Young, foreman."

* * *

Mr. Smith If your Honor please, the defendant wishes to move for judgment notwithstanding the verdict.

The Court: You can do that at any time [419] within ten days from now, you know.

Mr. Smith: Mr. Hursh and I have suggested that in view of the fact that he has to be in San Francisco very shortly,—tomorrow, as a matter of fact—that we would prefer to argue those by written brief.

The Court: Is that agreeable, Mr. Hursh?

Mr. Hursh: Yes, it is, your Honor. We have discussed it.

Mr. Smith: And the motion for a new trial.

The Court: Very well. How much time do you wish? [420]

* * *

Certificate

I Hereby Certify that as Official Reporter for the United States District Court for the Western District of Washington, Northern Division, during the trial of Addison N. Himes, and Ross A. Himes, individuals, doing business under the firm name and style of Nolox Company of America versus V. B. Chadwick, an individual, doing business under the firm name and style of Coast Carton Company, Cause No. 2092, I stenographically reported all of the testimony of the witnesses at the trial and all objections and exceptions of Counsel, together with the rulings of the Court thereon, hereto attached, consisting of pages 1 through 422, inclusive, and that the same has herewith been reduced to typewriting under my personal supervision.

Dated this 14th day of September, 1951, in Seattle, King County, Washington.

/s/ MERRITT G. DYER,
Court Reporter.

[Endorsed]: Filed September 15, 1951. [422]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision I of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75 (o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the Original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted, together with plaintiffs' Exhibits A to U, inclusive, and defendant's Exhibits 1 to 14, inclusive, 16, 17 and 18, constitute the record on appeal from the order granting defendant's Motion for Judgment Notwithstanding Verdict filed May 28, 1951, and the Final Decree filed June 8, 1951, to the United States Court of Appeals for the Ninth Circuit, and are identified as follows:

1. Complaint, filed Sept. 14, 1948.
2. Praecipe for Summons, filed Sept. 14, 1948.
3. Marshal's Return on Summons, filed Sept. 23, 1948.
4. Cost Bond (non-resident) of Plaintiff, filed Nov. 23, 1948.

5. Stipulation re uncertified copies of Letters Patent received in evidence, filed Jan. 7, 1949.

6. Amended Complaint, filed Feb. 9, 1949.

7. Plaintiff's Demand for Jury Trial, filed Feb. 9, 1948.

8. Motion Defendant for a More Definite Statement, filed Mar. 1, 1949.

9. More Definite Statement of Plaintiff's, filed Jul. 29, 1949.

10. Answer and Counterclaim of Defendant, filed Aug. 12, 1949.

11. Answer to Counterclaim, filed Sept. 23, 1949.

12. Plaintiff's Demand for Jury Trial, filed Sept. 23, 1949.

13. Defendant's Interrogatories under Rule 33 FRCP, filed Oct. 31, 1949.

14. Stipulation extending time to Nov. 30, 1949, within which plaintiff may answer or object to defendant's Interrogatories, filed Nov. 8, 1949.

15. Stipulation that plaintiff may have to Dec. 10, 1949, to answer or object to defendant's Interrogatories, filed Nov. 30, 1949.

16. Plaintiff's Answers and Objections to Defendant's Interrogatories, filed Dec. 9, 1949.

17. Motion Defendant for an Order Compelling Plaintiffs to Answer Certain Interrogatories, filed Dec. 15, 1949.

18. Defendant's Note for Hearing of above motion, filed Dec. 15, 1949.

19. Brief of Defendant's Points and Authorities in Support of Motion for an Order Compelling

Plaintiffs to Answer Certain Interrogatories, filed Dec. 15, 1949.

20. Memorandum in Opposition to Defendant's Motion for an Order Compelling Plaintiffs to Answer Certain Interrogatories, filed Dec. 23, 1949.

21. Stipulation re acceptance of answers to Interrogatories, by defendant, filed Jan. 6, 1950.

22. Supplemental Answers to Interrogatories, filed Jan. 23, 1950, with Nolo License Agreement attached.

23. Defendant's Statement in Accordance with Inter-Parties Stipulation of Jan. 6, 1950, filed Jan. 23, 1950.

24. Folded Carton, filed Jan. 23, 1950.

25. Motion Plaintiffs to Postpone Trial, filed Mar. 15, 1950.

26. Letter, Hursh to Mathis, dated Apr. 27, 1950, filed May 2, 1950.

27. Letter, Dr. Whalen to Arnold & Mathis, dated April 28, 1950, filed Jun. 22, 1950.

28. Request for Admission under Rule 36, filed by defendant, on Dec. 16, 1950.

29. Plaintiffs' Response to Defendant's Request for Admission under Rule 36, filed Dec. 28, 1950.

30. Plaintiffs' Interrogatories, filed Dec. 29, 1950.

31. Defendant's Response to Plaintiffs' Interrogatories, filed Jan. 6, 1951.

32. Notice of Taking Deposition of defendant, filed Jan. 10, 1951.

33. Notice of taking of deposition of Ross A. Himes, filed Jan. 10, 1951.

34. Marshal's Return on deposition subpoena, Chadwick, filed Jan. 15, 1951.

35. Request of Defendant for Admission under Rule 36, filed Jan. 18, 1951.

36. Defendant's Notice of Taking Deposition of Ross A. Himes, filed Jan. 19, 1951.

37. Praeipie for subpoena, Meade Hyndman, behalf defendant, filed Jan. 26, 1951.

38. Motion Plaintiffs to Suppress or Vacate Request for Admissions Pursuant to Rule 36 Served on Plaintiffs January 18, 1951, filed Jan. 27, 1951.

39. Notice of hearing above motion, filed Jan. 27, 1951.

40. Limitation of Issues Raised by Amended Complaint, Answer to Amended Complaint, Counterclaim, and Answer to Counterclaim, filed Jan. 31, 1951.

41. Brief on Defendant's Trial Memorandum, filed Feb. 1, 1951.

42. Plaintiffs' Requested Instructions to Jury, filed Feb. 1, 1951.

43. Defendant's Requested Instructions to Jury, filed Feb. 1, 1951.

44. Brief of Defendant in Support of Defendant's Motion for Dismissal of Claim 1 of Himes Patent Because of Failure of Plaintiffs to Disclaim Claim 3, filed Feb. 1, 1951.

45. Memorandum Relative Defendant's Motion for Dismissal of Suit on Himes Patent, filed Feb. 2, 1951.

46. Deposition of Ross A. Himes, filed Feb. 3, 1951.

47. Instructions of Court, filed Feb. 5, 1951.
48. Request of Jury for additional instructions on "new patent," filed Feb. 5, 1951.
49. Verdict of Jury, Filed Feb. 5, 1951.
50. Motions under Rule 50 and Motion to Dismiss, filed Feb. 15, 1951.
51. Memorandum on Motion Under Rule 50 and Motion to Dismiss, filed Feb. 19, 1951.
52. Stipulation extending time in which Plaintiffs may file memorandum in re Defendant's Motion for Directed Verdict, etc., filed Mar. 22, 1951.
53. Memorandum in Opposition to Defendant's Motions for Directed Verdict, Judgment Notwithstanding Verdict, New Trial, and for Dismissal, filed Mar. 22, 1951.
54. Stipulation that defendant may have to Apr. 4, 1951, within which to file answering Memorandum on Plaintiff's Memorandum in Opposition to Defendant's Motions for Directed Verdict, etc., filed Mar. 28, 1951.
55. Reply to Plaintiffs' Memorandum in Opposition, filed Apr. 4, 1951.
56. Order granting Defendant's Motion for Judgment notwithstanding verdict, filed May 28, 1951.
57. Final Decree, filed Jun. 8, 1951.
58. Notice of Appeal by Plaintiffs, filed Jun. 27, 1951.
59. Copy of Notice to Commissioner of Patents by Clerk.
60. Concise Statement of Points on Which Plain-

tiff-Appellants Intend to Rely on Appeal, filed Jul. 6, 1951.

61. Order extending time to file record on Appeal to Sept. 20, 1951, filed July 24, 1951.

62. Designation of Contents of Record on Appeal, filed Aug. 8, 1951.

63. Order directing transmission of original exhibits to United States Court of Appeals, filed Sept. 10, 1951.

64. Court Reporter's Transcript of Proceedings at Trial, filed Sept. 15, 1951. (In 3 volumes.)

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of plaintiffs, to wit: Filing fee, notice of appeal \$5.00. Which amount has been paid to me by the attorneys for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 15th day of September, 1951.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13100. United States Court of Appeals for the Ninth Circuit. Addison N. Himes and Ross A. Himes, Appellants, vs. V. B. Chadwick, an Individual, Doing Business Under the Firm Name and Style of Coast Carton Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed September 17, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13100

ADDISON N. HIMES and ROSS A. HIMES, Individuals, Doing Business Under the Firm Name and Style of NOLOX COMPANY OF AMERICA, ·

Appellants,

vs.

V. B. CHADWICK, an Individual, Doing Business Under the Firm Name and Style of COAST CARTON COMPANY,

Appellee.

CONCISE STATEMENT OF
POINTS ON APPEAL

Come Now appellants Addison N. Himes and Ross A. Himes, individuals, doing business under the firm name and style of NoloX Company of America, and make the following concise statement of the points upon which they intend to rely:

1. The Court erred in setting aside the verdict of the jury.

2. The Court erred in not denying defendant's Motion for Judgment Notwithstanding the Verdict on the ground that there was substantial evidence to support the verdict of the jury.

3. The Court erred in setting aside the verdict

of the jury because in so doing, appellants were denied a trial by jury.

4. The Court erred in signing and entering the final Judgment of June 7, 1951, in that said Judgment of June 7, 1951, is against the substantial weight of the evidence.

5. The Court erred in holding claims 2 and 5 of United States Letters Patent No. 2,011,232 invalid.

6. The Court erred in holding claim 1 of United States Letters Patent No. 2,243,421 invalid.

7. The Court erred in holding claim 1 of United States Letters Patent No. 2,243,421 was not infringed.

Dated October 4, 1951.

MELLIN, HANSCOM & HURSH,

By /s/ JACK E. HURSH,

Attorneys for Appellants.

I hereby certify that a copy of the foregoing Concise Statement of Points on Appeal has this day been mailed to Ford E. Smith, 734 Central Building, Seattle 4, Washington, and C. M. McCune, 4516 University Way, Seattle 5, Washington, attorneys for appellee.

October 4, 1951.

/s/ JACK E. HURSH.

[Endorsed]: Filed October 4, 1951.

[Title of Court of Appeals and Cause.]

ORDER

Good Cause Appearing Therefor, It Is Hereby Ordered that only nine (9) copies of Book of Exhibits be printed and bound in the above-identified appeal, said Book of Exhibits to contain plaintiffs-appellants Exhibits "A," "C" and "I" and defendant-appellee's Exhibits 4, 5, 6, 7, 8, 9 and 10.

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

/s/ WALTER L. POPE,

Judges, United States Court
of Appeals.

[Endorsed]: Filed November 21, 1951.

No. 13104

United States
Court of Appeals
For the Ninth Circuit.

DAVID BERNSTEIN, Trading as Affiliated
Credit Exchange and Business Research,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Transcript of Record

Petition to Review and Set Aside Order of the
Federal Trade Commission

FILED

JAN 21 1952

No. 13104

United States
Court of Appeals
For the Ninth Circuit.

DAVID BERNSTEIN, Trading as Affiliated
Credit Exchange and Business Research,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Transcript of Record

Petition to Review and Set Aside Order of the
Federal Trade Commission



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

CARL J. MOOSLIN,
756 South Broadway.
Los Angeles, Calif.,
For the Petitioner.

W. T. KELLEY,
General Counsel,

JAMES W. CASSEDY,
Asst. General Counsel,
Washington 25, D. C.,
For the Federal Trade Commission.

United States of America
Before Federal Trade Commission

Docket No. 5804

In the Matter of:

DAVID BERNSTEIN, an Individual Trading and
Doing Business as AFFILIATED CREDIT
EXCHANGE and BUSINESS RESEARCH

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that David Bernstein, an individual trading and doing business as Affiliated Credit Exchange and Business Research, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One: Respondent David Bernstein is an individual trading and doing business under the names Affiliated Credit Exchange and Business Research, with his office and principal place of business located at 326 West Third St., in the city of Los Angeles, California.

Paragraph Two: Respondent is now, and for more than two years last past, has been engaged in conducting a collecting agency and in collecting ac-

counts owed to others upon a commission basis contingent upon collection. Many of these accounts are sent to respondent from persons residing in states other than California.

Paragraph Three: In the course and conduct of his business, respondent frequently desires to ascertain the current addresses of persons from whom he is endeavoring to collect moneys due to his clients, the names and addresses of the employers of such persons and other information about such persons. For this purpose he uses, and has used, post cards of the type commonly referred to as "double post cards." These cards are mailed in bulk by respondent to his agent in Washington, D. C., and are in turn mailed by said agent at Washington, D. C., to the addresses located in various states. One part of the card is addressed to and contains a message for the debtor. On the side for the debtor's address there appears the following:

"Return to
"Business Research,
"703 Albee Building,
"Washington 5, D. C."

The card reads:

"Washington, D. C.

"To Addressee:

"To enable us to complete our records it is

necessary that you furnish the information requested on the attached card.

“Do this at once and mail to us.

“BUSINESS RESEARCH,
“By D. BERNSTEIN.”

The other, or “reply” part of the post card, is addressed to “Business Research, 703 Albee Building, Washington 5, D. C.” and is intended to be detached, filled out and mailed by the debtor. The following is a copy:

“Subject
“Subject’s Address
“Subject’s Employer
“Address:
“Monthly Salary: Does this
include room, board or services?.....
“Employed Since (Approximate date):.....
“Own Home? ... Rent? ... Own Auto?...
“If married, spouse’s name:.....
“Spouse’s employment, if any:.....
“Number of dependents:.....
“Your name:”

Along the right side of the card a box of figures similar to the arrangement appearing on “punch cards” commonly used for statistical purposes, is printed. Such cards as are completed and mailed

to the Washington, D. C., address are forwarded from Washington, D. C., to respondent in the State of California, by his said agent.

Paragraph Four: Through the use of the name "Business Research" and the form and phraseology of the cards, respondent represents that he is engaged in conducting a business research bureau or office, or in compiling business and labor statistics and that the information requested is for such purposes.

Paragraph Five: The aforesaid representations and the implications arising therefrom are false and misleading.

In truth and in fact, respondent is not conducting and is in no way connected with any research bureau, business or labor statistical office. His business and the sole purpose in sending said cards is in connection with the collection of accounts, and he is not engaged in business or labor research or the compiling of statistics of any nature.

Paragraph Six: The uses hereinabove set forth of the aforesaid cards has, and has had, the capacity and tendency to mislead and deceive, and has misled and deceived, many persons to whom the said cards were sent into the erroneous and mistaken belief that the trade name used by respondent indicated the true nature of his business; that he was engaged in conducting a research bureau or office or in compiling business and labor statis-

tics, and induced the recipients thereof to give information to respondent which otherwise they would not have supplied.

Paragraph Seven: The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, the Premises Considered, the Federal Trade Commission on this 5th day of September, A.D. 1950, issues its complaint against said respondent.

Notice

Notice is hereby given you, David Bernstein, respondent herein, that the 6th day of November, A.D. 1950, at 10 o'clock, is hereby fixed as the time, and Los Angeles, California, as the place when and where a hearing will be had before Everett F. Haycraft, a trial examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified and required, on or before the 20th day after service upon you of this complaint, to file with the Commission an answer to said complaint. The Rules of Practice of the Commission

with respect to answers or failure to appear or answer (Rule VIII) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * *

Failure of the respondent to file answer within the time above provided, and failure to appear at the time and place fixed for hearing, shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint, and findings as to the facts and conclusions based upon such answer shall be made and order entered disposing of the matter without any intervening procedure.

The respondent may, however, reserve in such answer the right to submit proposed findings and conclusions under Rule XXI, and the right to appeal under Rule XXIII.

Rule V of the Rules of Practice provides in part:

Upon request made within fifteen (15) days after service of the complaint, any party shall be afforded opportunity for the submission of facts, arguments, offers of settlement or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and due consideration shall be given to the same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed at Washington, D. C., this 5th day of September, A.D. 1950.

By the Commission.

[Seal] /s/ D. C. DANIEL,
Secretary.

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER

Comes now respondent and in answer to complaint on file, admits, denies and alleges as follows:

I.

Respondent admits all the material allegations of fact charged in the complaint to be true.

II.

Respondent denies that he is engaged in interstate commerce and that the Federal Trade Commission lacks jurisdiction to entertain this matter and that the Federal Trade Commission Act does not apply to this respondent.

III.

Respondent reserves herein the right to appeal under Rule XXIII of the Rules of practice of the Federal Trade Commission.

/s/ DAVID BERNSTEIN,

/s/ CARL J. MOOSLIN,

Attorney for Respondent.

Received October 2, 1950.

United States of America
Before Federal Trade Commission

[Title of Cause.]

REQUEST FOR PERMISSION TO FILE
SUBSTITUTE ANSWER

To Trial Examiner Everett F. Haycraft:

You will please take notice that respondent, through undersigned counsel, respectfully requests permission to substitute the accompanying Answer for the Answer heretofore filed and received by your office on October 2, 1950, as a review of said previous Answer has disclosed apparent contradictory statement and said Answer would not serve to properly place the issues before the Commission.

Respectfully submitted,

DAVID BERNSTEIN,
By /s/ CARL J. MOOSLIN,
Attorney for Respondent.

Dated this 16th day of October, A.D. 1950.

Received October 19, 1950,

United States of America
Before Federal Trade Commission

[Title of Cause.]

ORDER GRANTING RESPONDENT'S MOTION FOR PERMISSION TO WITHDRAW ANSWER AND TO FILE SUBSTITUTE ANSWER

This matter coming on to be heard by the Trial Examiner upon the request of counsel for respondent dated October 16, 1950, for permission to withdraw original answer filed October 2, 1950 because of an apparent contradictory statement appearing therein, and to file in lieu thereof a substitute answer dated October 16, 1950; and the trial examiner having duly considered the motion,

It Is Ordered that motion of counsel for respondent for permission to withdraw answer filed herein on October 2, 1950, and to file in lieu thereof answer dated October 16, 1959, be, and the same hereby is, granted.

Dated at Washington, D. C., this 19th day of October, 1950.

/s/ EVERETT F. HAYCRAFT,
Trial Examiner.

Received October 19, 1950.

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER

Comes Now the respondent, David Bernstein, an individual, trading and doing business as Affiliated Credit Exchange and Business Research, by his attorney, Carl J. Mooslin, and answering the complaint in this proceeding states that he admits all the material allegations of fact set forth in said complaint and waives all intervening procedure and further hearing as to the said facts.

Respondent denies that he is engaged in Interstate Commerce and further alleges that the Federal Trade Commission lacks jurisdiction over this respondent, and further that the Federal Trade Commission Act does not apply to this respondent and therefore respondent denies that the facts alleged in the complaint constitute a violation of the Federal Trade Commission Act and reserves the right to file brief and have oral argument on the law herein and reserves the right to appeal from any decision entered herein by the Commission.

Dated this 16th day of October, A.D. 1950.

DAVID BERNSTEIN,
By /s/ CARL J. MOOSLIN,
Attorney for Respondent.

Received October 19, 1950.

United States of America
Before Federal Trade Commission

[Title of Cause.]

NOTICE OF PLACE OF HEARING

Notice is hereby given that hearing in the above-entitled matter set to begin at 10 a.m. PST on November 6, 1950, in Los Angeles, California, will be held in Room 229, United States Post Office & Court House Building.

/s/ EVERETT F. HAYCRAFT,
Trial Examiner.

October 24, 1950.

Received October 24, 1950.

United States of America
Before Federal Trade Commission

[Title of Cause.]

PROPOSED FINDINGS AND CONCLUSION

To Trial Examiner Everett F. Haycraft:

Pursuant to Rule XXI of the Rules of Practice of the Federal Trade Commission, J. W. Brookfield, Jr., attorney supporting the complaint herein, submits to the Trial Examiner his proposed findings and conclusion therein, together with the reasons therefor as hereinafter set forth:

Proposed Finding:

Respondent David Bernstein is an individual trading and doing business under the names Affiliated Credit Exchange and Business Research, with his office and principal place of business located at 326 West Third St., in the city of Los Angeles, California.

Respondent is now, and for more than two years last past, has been engaged in conducting a collecting agency and in collecting accounts owed to others upon a commission basis contingent upon collection. Many of these accounts are sent to respondent from persons residing in States other than California.

Reason for Proposed Finding:

Admitted by answer and R. pp. 5-6, 8-9, stipulation R. p. 21.

Proposed Finding:

In the course and conduct of his business, respondent frequently desires to ascertain the current addresses of persons from whom he is endeavoring to collect moneys due his clients, the names and addresses of the employers of such persons and other information about such persons. For this purpose he uses, and has used, post cards of the type commonly referred to as "double post cards." These cards are mailed in bulk by respondent to his agent in Washington, D. C., and are in turn mailed by said agent at Washington, D. C., to the addresses located in various States. One part of the card is addressed to and contains a message for the debtor.

On the other side of the debtor's address there appears the following:

"Return to
 "Business Research,
 "703 Albee Building,
 "Washington 5, D. C."

The card reads:

"Washington, D. C.

"To Addressee:

"To enable us to complete our records it is necessary that you furnish the information requested on the attached card.

"Do this at once and mail to us.

"BUSINESS RESEARCH,
 "By D. BERNSTEIN."

The other, or "reply" part of the post card, is addressed to "Business Research, 703 Albee Building, Washington 5, D. C.," and is intended to be detached, filled out and mailed by the debtor. The following is a copy:

"Subject
 "Subject's Address
 "Subject's Employer
 "Address:
 "Monthly Salary: Does this
 include room, board or services?
 "Employed Since (Approximate Date):.....
 "Own Home ... Rent? ... Own Auto? ...
 "If married, spouse's name:
 "Spouse's employment, if any:
 "Number of dependents:
 "Your name:"

Along the right side of the card a box of figures similar to the arrangement appearing on "punch cards" commonly used for statistical purposes, is printed. Such cards as are completed and mailed to the Washington, D. C., address are forwarded from Washington, D. C., to respondent in the State of California, by his said agent.

Through the use of the name "Business Research" and the form and phraseology of the cards, respondent represents that he is engaged in conducting a business research bureau or office, or in compiling business and labor statistics and that the information requested is for such purposes.

Reasons for Proposed Findings:

It is admitted in the answer that respondent mails cards as desired. See also Record pp. 10-13, Com. Ex. 1a-1b, 2a, 2b, 3, 4, 5, and 6, R. pp. 15-18, stipulation R. p. 21.

Proposed Finding:

The aforesaid representations and the implications arising therefrom are false and misleading.

In truth and in fact, respondent is not conducting and is in no way connected with any research bureau, business or labor statistical office. His business and the sole purpose in sending said cards is in connection with the collection of accounts, and

he is not engaged in business or labor research or the compiling of statistics of any nature.

Reason for Proposed Finding:

R. p. 17-18, stipulation R. p. 21.

Proposed Finding:

The uses hereinabove set forth of the aforesaid cards has, and has had, the capacity and tendency to mislead and deceive, and has misled and deceived, many persons to whom the said cards were sent into the erroneous and mistaken belief that the trade name used by respondent indicated the true nature of his business; that he was engaged in conducting a research bureau or office or in compiling business and labor statistics, and induced the recipient thereof to give information to respondent which otherwise they would not have supplied.

Reason for Proposed Finding:

Respondent testified that he receives answers from 10 per cent of those to whom cards are sent. R. p. 19. Stipulation R. p. 21.

Proposed Conclusion:

The aforesaid acts and practices of respondent, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Reasons for Proposed Conclusion:

Testimony, stipulation and exhibits above referred to:

The only question at issue is the respondent's denial that he is within the jurisdiction of the Federal Trade Commission. In that connection the Trial Examiner's attention is directed to the number of cases involving the use of skip tracers by those who do not sell these devices as well as those who sell the forms as an article in commerce. See *Silverman v. FTC* (2d) 751 in which Judge Denman of the 9th Circuit rules that the use of skip tracers was a cheap swindle.

In the recent case of *Lewis, et al., v. Post Master General* in the U. S. District Court for the District of Columbia, Judge Holtzoff dismissed the Post Office fraud case against respondent who was charged with using skip tracer methods, but in his opinion agreeing with the *Silverman* case stated that "Unfair and deceptive acts and practices are far broader than the words 'scheme or artifice to defraud.' The practice may be unfair, it may be deceptive without necessarily being a scheme or artifice to defraud." (U. S. Dist. Ct. for D. C., December 10, 1947.)

While originally the idea of "commerce" was confined to the shipment of goods or commodities between the states or between the nations, this idea during the past half century

has been broadened so that at the present time the term embraces all intercourse between the states. Even a personal telegraphic message or telephone call is commerce under the liberal and widened definition of the term. The most narrow and conservative definition of commerce would be intercourse of a business or commercial nature. Even under this definition respondent's actions in mailing cards from California to Washington and his agent's action in mailing the cards from Washington to the straying debtors in various states of the United States would constitute commerce.

Commerce is defined by *corpus juris* as embracing business or commercial intercourse in any and all forms and branches and in all component parts between the citizens of different states and may embrace purely social intercourse between citizens of different states (15 C.J.S. 257). Among the cases quoted in support of this definition is *Blumenstock Bro. Advs. Agency v. Curtis Publishing Company*, 252 U. S. 436; *Norm Advertising v. Parker*, 172 Southern 586, 588. The courts have held that securities are the subject of interstate commerce (*Oklahoma-Texas Trust v. S.E.C.* 100 F. (2d) 888) and radio broadcasting constitutes interstate commerce when the radius extends beyond state lines (*NBC v. Board of Public Utilities of N. J.* 25 F. Supp. 761). That causing the interstate transmission of in-

formation or intelligence would bring respondents herein under the Federal Trade Commission can therefore not be denied and the Commission in a number of cases which have been before it has taken jurisdiction over parties engaged in the collection business wherein the circumstances were identical with those in the present case. See *FTC v. Southern Michigan Collection Service, et al.*, Docket 5058; *FTC v. Ancestral Survey, et al.*, Docket 5056; *FTC v. Herman*, Docket 5225. In the pending case of *FTC v. National Surveys Bureau*, Docket 5745, in which respondent is using his own skip tracing forms in his efforts to locate delinquent debtors, the learned and able counsel representing respondent did not question the Commission's jurisdiction in view of the fact that he was mailing his letters throughout the country.

Proposed Order:

It is ordered that respondent David Bernstein, trading as Affiliated Credit Exchange and Business Research, his representatives, agents and employees, directly or through any corporate or other device in connection with the use of form letters, return postal cards or other written or printed material in carrying on the business or collecting or aiding in the collection of debts in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words Business Research or any other words of similar import to designate, describe or refer to respondent's business or otherwise representing, directly or by implication that respondent is engaged in research in business or other forms of research.

2. Representing that respondent's said business is other than that of collecting debts or that the information sought by means of respondent's devices is for any purpose other than for the use in the collection of debts.

3. From representing that respondent's business is located in Washington, D. C.

Respectfully submitted,

/s/ J. W. BROOKFIELD, JR.,

Attorney Supporting

Complaint.

December 13, 1950.

Received December 15, 1950.

United States of America, Before
Federal Trade Commission

[Title of District Court and Cause.]

ORDER CLOSING CASE BEFORE THE
TRIAL EXAMINER

The taking of testimony in the above-entitled proceeding having been closed on the record as of November 6, 1950, and all intervening procedure as provided in the Commission's Rules of Practice having been complied with,

It Is Ordered that the case before the trial examiner be, and the same hereby is, closed as of December 20, 1950.

Dated at Washington, D. C., this 20th day of December, 1950.

/s/ EVERETT F. HAYCRAFT,
Trial Examiner.

Received December 20, 1950.

United States of America, Before
Federal Trade Commission

[Title of Cause.]

RULINGS UPON PROPOSED FINDINGS
AND CONCLUSION

Counsel in support of the complaint presented proposed findings and conclusion and the reasons therefor which have been given consideration. Inasmuch as the proposed findings followed generally the allegations of the complaint, which were admitted by counsel for respondent (Tr. 21), they have generally been adopted and made a part of the findings of the trial examiner in the Initial Decision.

The only questions at issue according to the pleadings is whether or not the Federal Trade Commission has jurisdiction over the respondent who is not engaged in the sale of any commodities in interstate commerce but is engaged in the business of operating a collection agency by means of post cards, form letters, and other similar devices, known as "skip tracers," which are transported through the mails from his place of business in California to Washington, D. C., and elsewhere throughout the United States.

The Commission has issued orders to cease and desist in other cases involving the use of "skip tracing" and the practice has been also condemned in the decision of the United States Circuit Court

of Appeals, *Silverman vs. FTC*, reported in 145 Fed. (2nd) 751. In the case, Judge Denman of the 9th Circuit affirmed the Commission's order to cease and desist, holding that "Petitioner's scheme is a cheap swindle and the argument that it is less so because it may in certain cases trap swindling debtors is not one pleasing to entertain."

The proposed conclusion of counsel in support of the complaint with respect to what constitutes commerce as that word is defined and used in the Federal Trade Commission Act is also acceptable. Although the respondent herein was not engaged in the sale of any product in commerce, his business required the use of the mails and the transportation of post cards, form letters and other similar devices from one state to another. This practice brings respondent within the jurisdiction of the Federal Trade Commission.

/s/ EVERETT F. HAYCRAFT,
Trial Examiner.

December 22, 1950.

Received December 26, 1950.

United States of America, Before
Federal Trade Commission

[Title of Cause.]

INITIAL DECISION

By Everett F. Haycraft
Trail Examiner

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on September 5, 1950, issued and subsequently served its complaint in this proceeding upon respondent David Bernstein, an individual trading and doing business as "Affiliated Credit Exchange" and "Business Research," charging him with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint, and the filing of respondent's answer thereto, hearings were held at which testimony and other evidence in support of said complaint were introduced before the above-named trial examiner, theretofore duly designated by the Commission, and a stipulation was made on the record between counsel that the material allegations of fact in the complaint were true.¹ No testimony was offered in opposition to the allegations of the complaint and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said trial

¹Tr. 21.

examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel in support of the complaint, no proposed findings being submitted by counsel in opposition to the allegations of the complaint; and said trial examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order.

Findings as to the Facts

Paragraph One: Respondent David Bernstein is an individual trading and doing business under the name of Affiliated Credit Exchange and Business Research, with his office and principal place of business located at 326 West Third Street in the city of Los Angeles, California.

Paragraph Two: Said respondent is now, and for more than two years last past, has been engaged in operating a collection agency and in collecting accounts owed to business and professional individuals, partnerships, and corporations, including doctors, dentists, garages, grocery stores, upon a commission basis contingent upon collection. Many of these accounts are sent to respondent from persons residing in states other than California. Most of respondent's said accounts are in western states, Oregon, Washington, Wyoming, and California, and the creditors are scattered about in many states.

Paragraph Three: Said Respondent, in the

course and conduct of his said business, attempts to ascertain the current addresses of persons from whom he is endeavoring to collect money due his clients, the names and addresses of the present employers of such persons and other information about such persons. For this purpose he has used and now uses double post cards which are mailed in bulk by said respondent to his agent in Washington, D. C., who, in turn, mails said post cards to the addresses located in various states of the United States. One part of the card is addressed to the debtor with the following message:

“Return to

“Business Research,

“703 Albee Building,

“Washington 5, D. C.”

The card reads:

“Washington, D. C.

“To Addressee:

“To enable us to complete our records it is necessary that you furnish the information requested on the attached card.

“Do this at once and mail to us.

“BUSINESS RESEARCH

“By D. BERNSTEIN.”

The other, or “reply” part of the post card, is addressed to “Business Research, 703 Albee Building, Washington 5, D. C.” and is intended to be de-

tached, filled out and mailed by the debtor. The following is a copy:

"Subject
 "Subject's Address.....
 "Subject's Employer.....
 "Address
 "Monthly Salary.....Does this
 include room, board or services?
 "Employed Since (Approximate Date).....
 "Own Home?....Rent?....Own Auto?.....
 "If married, spouse's name.....
 "Spouse's employment, if any.....
 "Number of dependants.....
 "Your name....."

Along the right side of the card a box of figures similar to the arrangement appearing on "punch cards" commonly used for statistical purposes, is printed. Such cards as are completed and mailed to the Washington, D. C., address are forwarded from Washington, D. C., to respondent in the State of California, by his said agent.²

Through the use of the name "Business Research" and the form and phraseology of the cards, respondent represents that he is engaged in conducting a business research bureau or office, or in compiling business and labor statistics and that the information requested is for such purposes.

²Tr. 10-13, 15-18, 21; Cxs. 1a-1b, 2a, 2b, 3, 4, 5, and 6.

Paragraph Four: The aforesaid representations and the implications arising therefrom are false and misleading. In truth and in fact, respondent is not conducting and is in no way connected with any research bureau, business or labor statistical office. The sole purpose in sending the post cards is in connection with the collection of unpaid accounts. He is not engaged in any other business.

Paragraph Five: The method used by respondent in ascertaining the location of debtors is known as "skip tracing." Said respondent has no office in Washington, D. C., and employs an agent for the sole purpose of distributing the double post cards, hereinbefore described, to locate the debtor and to get as much information as possible in order to make a recovery of money for the creditor who has employed the said respondent for that purpose. This subterfuge was used to get the desired information because if respondent wrote to them in the name of the creditor or in the name of Affiliated Credit Exchange, the debtor never would answer.

Paragraph Six: The use by said respondent, as hereinabove set forth, of the false, deceptive and misleading representations and designations, has had and now has the capacity and tendency to mislead and deceive, and has misled and deceived, many persons to whom the said cards were sent into the erroneous and mistaken belief that the trade names used by the respondent indicated that he was engaged in conducting a research bureau or office or in compiling business and labor statistics,

and induced the recipients thereof to give information to said respondent which otherwise they would not have supplied.

Conclusion

The aforesaid acts and practices of respondent as hereinabove set out are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Order

It Is Ordered that the respondent David Bernstein, an individual trading and doing business as Affiliated Credit Exchange and Business Research, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of a collection system, including the use of double post cards, form letters or other written or printed material, or similar devices, in taking on the business of collecting or aiding in the collection of accounts or debts, in commerce as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

1. Using the words Business Research or any other words of similar import to designate, describe or refer to respondent's business or otherwise representing, directly or by implication that respondent is engaged in research in business or other forms of research.

2. Representing that respondent's said business is other than that of collecting accounts or debts or that the information sought by means of respondent's devices is for any purpose other than for the use in collection of accounts or debts.

3. Representing that respondent's business is located in Washington, D. C., or any other place other than where it is actually located for the purpose of misleading the debtors as to respondent's place of business.

/s/ EVERETT F. HAYCRAFT,
Trial Examiner.

December 22, 1950.

Received December 26, 1950.

United States of America, Before
Federal Trade Commission

[Title of Cause.]

NOTICE OF INTENTION TO APPEAL

To Federal Trade Commission and to Everett F.
Haycraft, Trial Examiner:

Please take notice that the respondent in the above-captioned matter hereby files Notice of Intention to Appeal on the following grounds:

1. That the order does not determine whether or not respondent is engaged in interstate com-

merce and that the only basis for validity of the order is that an assumption has been made from the mere fact respondent uses the mails for post cards, letters and other similar devices from one state to another, that he is in interstate commerce.

2. That the order is based upon a finding that is not supported by evidence, to wit, that respondent offers for sale, sale and distribution of a collection system and that nowhere in the findings is there shown either by admission or by evidence that respondent offers for sale, sale and distribution of a collection system.

That service of the initial decision was made upon respondent on the 8th day of January, 1951.

Dated January 16, 1951.

DAVID BERNSTEIN,
By /s/ CARL J. MOOSLIN,
Attorney for Respondent and
Appellant.

Received January 18, 1951.

United States of America, Before
Federal Trade Commission

[Title of Cause.]

ORDER SUSTAINING IN PART AND DENY-
ING IN PART RESPONDENT'S APPEAL
FROM INITIAL DECISION OF TRIAL
EXAMINER

This matter coming on to be heard by the Commission upon the respondent's appeal from the trial examiner's initial decision herein, his brief in support thereof, and a brief in opposition thereto, filed by counsel in support of the complaint (oral argument not having been requested); and

It appearing that the grounds relied upon to sustain the appeal are (1) that the trial examiner's findings as to the facts are defective in that they fail to show that the case is within the Commission's jurisdiction, the argument being that there is no specific finding that the respondent is engaged in interstate commerce, and (2) that the order to cease and desist prohibits the use of certain practices in connection with the offering for sale, sale and distribution of a certain kind of bill collection system, whereas the record shows that the respondent does not sell, but merely uses, the collection system described in the findings; and

It further appearing from the record that the respondent, with his principal place of business in the State of California, solicits for collection certain

accounts from business and professional individuals, partnerships and corporations located in various states of the United States other than California; that the records of such accounts are transmitted by mail to the respondent in California by such individuals, partnerships and corporations from their respective places of location; that the respondent then transmits by mail to an agent in Washington, D. C., certain post cards to be used by the agent in obtaining information concerning the persons from whom the respondent is attempting to make collections; and that the respondent's agent mails the cards to the alleged debtors and others located in various states throughout the country, a certain percentage of whom fill in the cards and return them by mail to the agent in Washington, D. C., who, in turn, mails them to the respondent in California; and

It further appearing that all of these facts are reflected in the trial examiner's findings as to the facts and that on the basis of such facts the trial examiner concluded that "The aforesaid acts and practices of respondent as hereinabove set out are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act"; and

The Commission being of the opinion that its jurisdiction over the respondent's operations is thus adequately shown in the trial examiner's findings as to the facts; and

The Commission being of the further opinion, however, that the trial examiner's order to cease and desist improperly prohibits the practices referred to therein when used "in connection with the offering for sale, sale and distribution of a collection system * * *," and should have enjoined such practices in connection with the use of post cards or other written or printed material in carrying on the business of collecting or aiding in the collection of accounts or debts:

It Is Ordered that the respondent's appeal from the trial examiner's initial decision in this proceeding be, and it hereby is, sustained in part and denied in part as hereinabove indicated.

The changes in the initial decision necessitated by this ruling are reflected in the Commission's decision of the case which is being issued simultaneously herewith.

By the Commission.

[Seal] /s/ WM. P. GLENDENING, JR.,
Acting Secretary.

Issued: July 9, 1951.

United States of America, Before
Federal Trade Commission

Docket No. 5804

Commissioners: James M. Mead, Chairman; William A. Aryes, Lowell B. Mason, John Carson, Stephen J. Spingarn.

In the Matter of

DAVID BERNSTEIN, an Individual Trading and
Doing Business as AFFILIATED CREDIT
EXCHANGE and BUSINESS RESEARCH.

DECISION OF THE COMMISSION AND
ORDER TO FILE REPORT OF COMPLI-
ANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on September 5, 1950, issued and subsequently served its complaint in this proceeding upon the respondent, David Bernstein, an individual trading and doing business as "Affiliated Credit Exchange" and as "Business Research," charging said respondent with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of the respondent's answer thereto, hearings were held at which testimony and other evidence in support of the complaint were introduced before a trial examiner of the Commission theretofore designated by it, and a stipulation by and between counsel was entered on the record to

the effect that the material allegations of fact set forth in the complaint were correct. The aforesaid testimony and other evidence were duly recorded and filed in the office of the Commission, and on December 26, 1950, the trial examiner filed his initial decision.

Within the time permitted by the Commission's Rules of Practice the respondent filed with the Commission an appeal from said initial decision; and thereafter this proceeding regularly came on for final consideration by the Commission upon the record herein, including the respondent's brief in support of its appeal and the brief in opposition thereto filed by counsel in support of the complaint (oral argument not having been requested); and the Commission, having issued its order sustaining in part and denying in part the respondent's appeal, and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the findings as to the facts, conclusion, and order included in the initial decision of the trial examiner.

Findings as to the Facts

Paragraph One: Respondent David Bernstein is an individual trading and doing business under the names of Affiliated Credit Exchange and Business Research, with his office and principal place of business located at 326 West Third Street in the City of Los Angeles, State of California.

Paragraph Two: Said respondent is now, and for more than two years last past has been, engaged in operating a collection agency and in collecting accounts owed to business and professional individuals, partnerships, and corporations, including doctors, dentists, garages, and grocery stores, upon a commission basis contingent upon collection. Many of these accounts are sent to respondent from persons residing in states other than California. Most of respondent's said accounts are in the western states of Oregon, Washington, Wyoming, and California, and the creditors are scattered about in many states.

Paragraph Three: Said respondent, in the course and conduct of his said business, attempts to ascertain the current addresses of persons from whom he is endeavoring to collect money due his clients, the names and addresses of the present employers of such persons and other information about such persons. For this purpose he has used and now uses double post cards which are mailed in bulk by said respondent to his agent in Washington, D. C., who, in turn, mails said post cards to the addressees located in various states of the United States. One part of the card is addressed to the debtor with the following message:

“Return to

“Business Research,

“703 Albee Building,

“Washington 5, D. C.”

The card reads:

“Washington, D. C.

“To Addressee:

“To enable us to complete our records it is necessary that you furnish the information requested on the attached card.

“Do this at once and mail to us.

“BUSINESS RESEARCH,

“By D. BERNSTEIN,

The other or “reply” part of the post card is addressed to “Business Research, 703 Albee Building, Washington 5, D. C.,” and is intended to be detached, filled out and mailed by the debtor. The following is a copy:

“Subject
 “Subject’s Address.....
 “Subject’s Employer.....
 “Address
 “Monthly Salary.....Does this
 include room, board or services?.....
 “Employed Since (Approximate Date).....
 “Own Home?.....Rent?.....Own Auto?....
 “If married, spouse’s name.....
 “Spouse’s employment, if any.....
 “Number of dependents.....
 “Your name.....”

Along the right side of the card a box of figures similar to the arrangement appearing on “punch cards” commonly used for statistical purposes is printed. Such cards as are completed and mailed to the Washington, D. C., address are forwarded

from Washington, D. C., by the respondent's agent to respondent in the State of California.

Through the use of the name "Business Research" and the form and phraseology of the cards, respondent represents that he is engaged in conducting a business research bureau or office or in compiling business and labor statistics and that information requested is for such purposes.

Paragraph Four: The aforesaid representations and the implications arising therefrom are false and misleading. In truth and in fact, respondent is not conducting and is in no way connected with any research bureau or any business or labor statistical office. The respondent's sole purpose in sending the post cards is to obtain information for use in connection with the collection of unpaid accounts. The respondent is not engaged in any other business.

Paragraph Five: The method used by respondent in ascertaining the location of debtors is known as "skip tracing." Said respondent has no office in Washington, D. C., and employs an agent for the sole purpose of distributing the double post cards, hereinbefore described, to locate the debtors and to get as much information as possible in order to make a recovery of money for the creditor who has employed said respondent for that purpose. This subterfuge is used to get the desired information because if respondent should write to them in the name of the creditor or in the name of Affiliated Credit Exchange the debtor never would answer.

Paragraph Six: The use by said respondent, as

hereinabove set forth, of the false, deceptive and misleading representations and designations has the capacity and tendency to mislead and deceive many persons to whom the said cards are sent into the erroneous and mistaken belief that the respondent is engaged in conducting a research bureau or office or in compiling business and labor statistics, and to induce the recipients thereof to give information to said respondent which otherwise they would not supply.

Conclusion

The aforesaid acts and practices of respondent are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Order

It Is Ordered that the respondent, David Bernstein, an individual trading and doing business as Affiliated Credit Exchange and as Business Research, or trading under any other name or trade designation, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the use of post cards or other written or printed material in carrying on the business of collecting or aiding in the collection of debts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Business Research,"

or any other word or words of similar import, to designate, describe or refer to the respondent's business; or otherwise representing, directly or by implication, that the respondent is engaged in research in business or in other forms of research.

2. Representing, directly or by implication, that the respondent's said business is other than that of collecting accounts or debts, or that the information sought by means of the respondent's devices is for any purpose other than for use in the collection of accounts or debts.

3. Representing, for the purpose of misleading debtors or others as to the respondent's place of business, that his business is located in Washington, D. C., or any place other than its actual location.

It Is Further Ordered that respondent shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

By the Commission.

[Seal] /s/ WM. P. GLENDENING, JR.,
 Acting Secretary.

Initialed: J.M.M., W.A.A., L.B.M., J.C., S.J.S.

Issued July 9, 1951.

Certificate

This is to certify that the following pages and related exhibits are a transcript of hearings before the Federal Trade Commission in the matter of:

Docket No.—5804.

Case Title—Affiliated Credit Exchange and Business Research.

Place—Los Angeles, California.

Date—November 6, 1950.

Pages Numbered 1 to 38, inclusive: which were had as therein appears, and that this is the original transcript thereof for the files of the Commission.

ELECTREPORTER, INC.,
Official Reporter.

By /s/ WAYNE BIRDELL,
Vice-President.

United States of America
Before Federal Trade Commission

[Title of Cause.]

PROCEEDINGS

Trial Examiner Haycraft: This is the initial hearing in Docket 5804, entitled Federal Trade Commission versus David Bernstein, an individual trading and doing business as Affiliated Credit Exchange and Business Research, and we are meeting in Los Angeles, California, at 10:00 o'clock a.m. before Everett F. Haycraft, duly appointed and qualified officer of the said Commission, pursuant to an order of the Commission. Only those persons who have legally entered their appearances will be permitted to participate in this proceeding.

Under the rules the Trial Examiner is authorized to hold conferences before or during the trial for the settlement and simplification of the issues. I will ask, Mr. Brookfield, whether you wish to make such a request?

Mr. Brookfield: Yes, if your Honor please. Judging from the correspondence that has gone on between Mr. Mooslin and myself, there does not seem to be any great amount of difference in the testimony, and I think if I may talk with him a few minutes we may be able to arrive at a basis of settlement that will obviate the necessity of an extended hearing.

Trial Examiner Haycraft: Very well. That is the reason I didn't make any extended remarks in opening the case. I should probably say to you that

it is an alleged violation [3*] of Section V of the Federal Trade Commission Act. So I will grant a recess. How much time do you think you want—15 or 20 minutes?

Mr. Brookfield: I imagine so.

Trial Examiner Haycraft: I will accordingly give you a recess of 15 minutes. You may confer with counsel and see whether or not you can agree upon a stipulation of facts.

Mr. Brookfield: All right, thanks.

(A short recess was taken.)

Trial Examiner Haycraft: Proceed.

Mr. Brookfield: I will call Mr. David Bernstein.

DAVID BERNSTEIN

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Trial Examiner Haycraft: Give the reporter your full name and address.

The Witness: David Bernstein, 6332 Whitsett Avenue, North Hollywood.

Direct Examination

By Mr. Brookfield:

Q. What is your business connection, Mr. Bernstein?

A. I am a collection agency operator.

Q. You are located in the City of Los Angeles?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of David Bernstein.)

A. Yes, sir, at 326 West Third Street. [4]

Q. You operate as an individual?

A. Yes, sir.

Q. An individually owned agency?

A. Yes, sir, doing business as Affiliated Credit Exchange.

Q. In connection with your collection agency, do you represent clients located in various parts of the United States? A. Yes, sir.

Q. Will you tell his Honor briefly how you handle those claims for your clients?

A. Well, we process them in different manners, through correspondence——

Q. I don't mean the actual collection. How do you solicit your accounts?

A. Well, we solicit by personal contact, men in the field. We also have listings in recognized license books.

Q. Do you solicit by mail, too? A. No.

Trial Examiner Haycraft: You mean you don't write letters to the prospects, you don't have a mailing list that you write letters to?

The Witness: No, sir, we don't have any mailing campaign in the solicitation of business.

Q. (By Mr. Brookfield): You do, however, employ men who personally solicit other collection organizations or agencies? [5]

Mr. Mooslin: I would like to object to the terminology "employ." I appreciate your intent in the question, but will you phrase it without using the word employment?

(Testimony of David Bernstein.)

Trial Examiner Haycraft: Well, the witness has stated that they made solicitation by personal contact by men in the field. Just go on and explain that further. How do you employ these men? How do you get the men in the field to do what you do? Do you write to them? Are they employees or are they independent?

The Witness: They are independent contractors, sir. They are independent contractors, and they are advised in the inception of the type of accounts that we are interested in, and so forth. They are independent contractors and they solicit in various areas in Southern California and mail the accounts to us, the business, as we call it.

Is that the answer?

Mr. Brookfield: I think that covers it.

Trial Examiner Haycraft: How do you arrange these contacts with the men that make the contact with the accounts?

The Witness: You mean with the clients?

Trial Examiner Haycraft: Yes.

The Witness: That is what we call cold turkey.

Trial Examiner Haycraft: Tell us what cold turkey [6] is.

The Witness: Well, that means that in that area, wherever it might be, that if this man is a man that specializes in professional accounts——

Trial Examiner Haycraft: And he has a collection agency that you are talking about and he is the man who collects the accounts?

The Witness: Oh, no, he just solicits the new

(Testimony of David Bernstein.)

business. He doesn't handle the collection end of it at all. That is the collection. You asked me about the men, how we get our business, how we get our money on accounts.

Mr. Brookfield: We haven't got to collecting the money yet.

Trial Examiner Haycraft: We haven't got to that.

The Witness: Oh, I see.

Trial Examiner Haycraft: How do you make contact with the man who solicits the accounts? You say he is an independent contractor. How do you contact him and arrange with the independent contractor?

The Witness: Well, we are pretty well known in the field. I have been in the collection business here since 1923, and the men come to us in reference to going to work on that basis.

Trial Examiner Haycraft: Do you want to develop that any farther? [7]

Q. (By Mr. Brookfield): Only to the extent—These men are paid on a percentage rate, or something like that? They are not paid a salary?

A. No, they are not paid any salary and no expense, no traveling expenses, and so forth. We have a rate; we pay so much on account to those men. Is that clear?

Q. I think that covers that particular point.

Trial Examiner Haycraft: I think I understand it a little better than I did anyway.

The Witness: Well, it is a little specialized endeavor.

(Testimony of David Bernstein.)

Trial Examiner Haycraft: You see, I am not familiar with it. That is the reason I ask so many questions.

The Witness: Yes.

Q. (By Mr. Brookfield): Now, Mr. Bernstein, approximately how many of these men do you have traveling at various times?

A. Oh, five or six men.

Q. They travel both in California and in other states, too? A. Yes, sir.

Q. And that is all the time you have been in this business? A. Yes, sir.

Q. They solicit accounts from California and other states other than California?

A. Yes, sir. [8]

Trial Examiner Haycraft: You mean from people in other states, is that what you mean?

Q. (By Mr. Brookfield): From creditors in those states?

A. Yes, creditors. They contact creditors.

Q. And, Mr. Bernstein, the debtors of these creditors, are they located both within and without the State of California, too?

A. Oh, yes, they are all over.

Q. In the course and conduct of your collection business, do you have occasion to write to debtors who are located within and without the State of California? A. Yes, sir.

Q. That is a continuous process from the time you get the accounts until you have either collected them or given them up? A. Yes, sir.

(Testimony of David Bernstein.)

Q. Mr. Bernstein, generally what type of business people are the creditors whom you represent, or is there any particular type?

A. We don't specialize. We handle business for doctors, dentists, garages, grocery stores, anything that is legitimate that is backed up by evidence of a debt and so certified to us in writing.

Q. Do you handle any accounts with chain stores? [9] A. No.

Q. No nationally advertised stores?

A. No, sir.

Q. In the course and conduct of your collecting business, do you have to make attempts to locate these debtors? A. Oh, yes.

Q. In the course of locating these debtors, do you use what is commonly known as skip tracers?

Trial Examiner Haycraft: Better define that. I don't know what a skip tracer is.

Q. (By Mr. Brookfield): Well, do you use letters, postcards rather——

Mr. Brookfield: I will ask, your Honor, to be marked for identification Commission's Exhibits——

The Witness: You mean whether we use that card?

Q. (By Mr. Brookfield): Yes.

A. Sure we do.

Q. Is this what is commonly known as a skip tracer?

A. Well, particularly a skip tracer is an individual in your office who uses the telephone to try

(Testimony of David Bernstein.)

to locate this party or that party. These are what we call tracing forms.

Q. Tracing forms?

A. The word "skip tracer" ordinarily refers to an individual. That is why I hesitated there. [10]

Q. I want his Honor to get the whole picture, if possible. A. Yes, tracing form.

Trial Examiner Haycraft: A skip tracer is a man, you say, who sits at the telephone and calls around different places trying to locate people?

The Witness: Well, your client gives you an account, we will say a doctor gives us an account against a certain party, a balance due of a hundred dollars for an operation, and gives us a certain address, when the account comes to us and we find after a little investigation that the man has moved, well, we will try to locate him, that is, we locate him by skip tracing, and we use the telephone or other means.

Trial Examiner Haycraft: You have an exhibit to be marked?

Mr. Brookfield: Yes, sir. Your Honor, I have here a double postcard, one side of which is addressed to Art Soulsby, Rock Springs, Wyoming, and the return part of the postcard is addressed to Business Research, 703 Albee Building, Washington, D. C. I ask that that be marked for identification as Commission's Exhibits 1-A and 1-B.

Trial Examiner Haycraft: That may be done.

(The papers referred to were marked Com-

(Testimony of David Bernstein.)

mission's Exhibits 1-A and 1-B for identification.)

Mr. Brookfield: I ask that a double postcard addressed on one side to A. F. Faulkner, Addressee, Girard, [11] Kansas, and the other side to the Business Research, be marked as Commission's Exhibits 2-A and 2-B.

Trial Examiner Haycraft: The same Business Research at Washington, D. C.?

Mr. Brookfield: Yes, sir, Business Research, 703 Albee Building, Washington, D. C.

(The papers referred to were marked Commission's Exhibits 2-A and 2-B for identification.)

Mr. Brookfield: I don't see any use of unduly burdening the record. I have here four other cards, all of them addressed to Business Research, 703 Albee Building, Washington, D. C., postmarked at various places in the United States. I ask that they be marked Commission's Exhibits 3, 4, 5 and 6.

Trial Examiner Haycraft: A and B?

Mr. Brookfield: They are separate cards. I don't want them A and B, because there is no return.

Trial Examiner Haycraft: No, there is no return, I see.

(The papers referred to were marked Commission's Exhibits 3, 4, 5, and 6 for identification.)

Q. (By Mr. Brookfield): You have seen these, Mr. Bernstein? I show you a return card addressed

(Testimony of David Bernstein.)

to Business Research on one side of the return and this Commission's Exhibit 1-A is addressed to Art Soulsby, [12] Rock Springs, Wyoming. Have you seen that card or a card identical with it before?

A. Well, this is the card used by us. I don't remember this.

Q. Over what period of time have you used that card?

A. We have used this card, I would say, about eleven or twelve years. Are those the cards I gave your investigator?

Q. Some of them are, yes.

A. I don't remember that offhand, but anyway, this is our card. This is the card we use. This is the card we mail out.

Trial Examiner Haycraft: What is that Business Research in Washington, D. C.? Is that a name you operate under?

The Witness: Yes, sir.

Mr. Brookfield: I am going to bring that out in just a minute, your Honor. I ask that the card be received in evidence.

Trial Examiner Haycraft: There is no objection?

Mr. Mooslin: No objection. Stipulate that it may be received.

Trial Examiner Haycraft: 1-A and 1-B will be received in evidence.

(The papers referred to, heretofore marked for identification Commission's Exhibits 1-A and 1-B, were received in evidence.) [13]

Washington, D. C.

To Addressee:

To enable us to complete our records it is necessary that you furnish the information requested on the attached card.

Do this at once and mail to us.

FEDERAL TRADE COMMISSION

DOCKET NO. 5804 EXHIBIT NO. 1A BUSINESS RESEARCH

THE MATTER OF *David Bernstein* By *D. Bernstein*DATE *11/6/50* WITNESS *Bernstein* By *D. Bernstein*

ELECTROREPORTER, INC., Official Report

Com. 1a By *Drummond*

FEDERAL TRADE COMMISSION

DOCKET NO. 5804 EXHIBIT NO. 1B

IN THE MATTER OF *David Bernstein*DATE *11/6/50* WITNESS *Bernstein*

ELECTROREPORTER, INC., Official Report

By *Drummond*

BUSINESS RESEARCH

703 Albee Building

WASHINGTON 5, D. C.

Com 1a

Subject: Art Soulsby

Subject's Address:

Subject's Employer:

Address:

Monthly Salary: Does this include, room,
board or services?

Employed since (approximate date):

Own home? Rent? Own Auto?

If married, spouse's name:

Spouse's employment, if any:

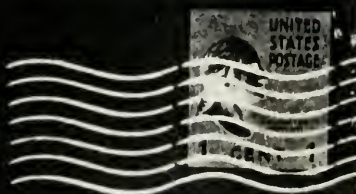
Number of dependents:

Your name:

DETACH BEFORE MAILING

Occup.	Sal.	Base	Mo.	Day	Yr.	Tec.	Lab.	Off.	Pro.	Sten.	Blk.	Sls.
0	0	0	0	0	0	0	0	0	0	0	0	0
1	1	1	1	1	1	1	1	1	1	1	1	1
2	2	2	2	2	2	2	2	2	2	2	2	2
3	3	3	3	3	3	3	3	3	3	3	3	3
4	4	4	4	4	4	4	4	4	4	4	4	4
5	5	5	5	5	5	5	5	5	5	5	5	5
6	6	6	6	6	6	6	6	6	6	6	6	6
7	7	7	7	7	7	7	7	7	7	7	7	7
8	8	8	8	8	8	8	8	8	8	8	8	8
9	9	9	9	9	9	9	9	9	9	9	9	9

Return to
BUSINESS RESEARCH
 703 Albee Building
 WASHINGTON 5, D. C.



Art Soulsby
 Rock Springs
 Wyo.

(Testimony of David Bernstein.)

Mr. Brookfield: Your Honor, it is stipulated, I believe, between Mr. Mooslin and myself that 1-A and 1-B, 2-A and 2-B, 3, 4, 5, and 6, may be received in evidence.

Trial Examiner Haycraft: All right. All of the exhibits beginning with 1-A are received in evidence.

(The papers referred to, heretofore marked for identification Commission's Exhibits 2-A, 2-B, 3, 4, 5, and 6, were received in evidence.)

Subject: K. F. Faulkner

Subject's Address: _____

Subject's Employer _____

Address: _____

Monthly Salary:..... Does this include, room
board or services?.....

Employed since (approximate date):

Own home?.....Rent?.....Own Auto?.....

If married, spouse's name: _____

Spouse's employment, if any: _____

Number of dependents: 14

Your name: _____ DATE: _____

DETACH BEFORE MAILING

Return to

BUSINESS RESEARCH

703 Albee Building

WASHINGTON 5, D. C.

SECRET

DATE 11/6/50

THE COMMISSION
COMMISSION'S EXHIBIT NO. 28
WASHINGTON

4 D. C. *David Bernhardt* JAN 26 1964 7-PM
Bernhardt
 DIRECTOR, INC. 1964
 A. S. Faulkner
 Chief
 Clerk

~~A. G. Faulkner~~
~~Chief~~
~~Manager~~

Alva

56

Washington, D. C.

o Addressee:

To enable us to complete our records it is necessary that
 ou furnish the information requested on the attached card.

Do this at once and mail to us.

BUSINESS RESEARCH

By

[Handwritten signature]



BUSINESS RESEARCH

703 Albee Building

WASHINGTON 5, D. C.

82

89

FEDERAL TRADE COMMISSION

DOCKET NO. 5804

COMMISSION'S EXHIBIT NO. 1

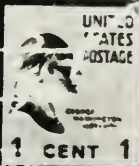
IN THE MATTER OF David Bernstine

DATE 11/6/50

WITNESS Bernstine

ELECTRIC REPORTER, INC., Official Reporter

By Drummond



BUSINESS RESEARCH

703 Albee Building

WASHINGTON 5, D. C.

Handwritten notes: "Barnett's", "11/6/50", "1-5804", "1-5804"

13

Subject Carl Holland

Subject's Address 47 - Water Street

Subject's Employer none

Address

Monthly Salary \$45.00 Does this include room board or services? No

Employed since (approximate date):

Own home? No Rent? Yes Own

If married, spouse's name:

Spouse's employment, if any:

Number of dependents:

Your name: Carl Holland

Vertical text: FEDERAL TRADE COMMISSION, IN THE MATTER OF, DATE 11/6/50, WITNESS, ELECTRIC REPORTER, INC., Official Reporter

Table with 10 columns (Occup, Ed, Base, Mo, Day, Yr, Tec, Lab, Off, Pro, Spec, Exp, Sta) and 20 rows of data.

DETACH BEFORE MAILING

5

6274

63

COMMISSIONER'S EXHIBIT NO. 18

David R. ... MAR 6

WITNESS Be 1903

ELECTREPORTER, INC., Office

B. Domestic

BUSINESS RESEARCH

703 Albee Building

WASHINGTON 5, D. C.

6-19
 6-19
 6-19
 6-19

Subject: MRS. ANGELA HISE

Subject's Address: 810 M. St.

Subject's Employer: None

Address: _____

Monthly Salary None Does this include room
board or services? Yes

Employed since (approximate date):

Own home? no Rent? no Own Auto? no

If married, spouse's name: James E. Smith OF

Spouse's employment, if any:

Number of dependents: none

Your name: Gonzalo E.

DETACH BEFORE MAILING

DEPARTMENT OF COMMERCE

Book No. 5704
 Indexed by 5704
 IN THE MATTER OF
 1919
 Daniel Knapp
 Plaintiff
 vs.
 Daniel Knapp
 Defendant
 Date 1/6/50
 Witnesses

1/6/50 WINNER: *Robertson*
ELECTROTYPE CO., INC., Official Printer

James M. Smith

[illegible]

(Testimony of David Bernstein.)

Mr. Brookfield: That is for every one of them?

The Witness: Yes, those are ours.

Q. (By Mr. Brookfield): Mr. Bernstein, referring to the Commission's Exhibit——

A. These are also ours, your Honor.

Q. ——Commission's Exhibit 1-A, which is the one I first showed you, will you tell his Honor how that is used in your business?

A. This is a card we got up, we print and we use. We don't sell it. We don't give it away. We don't peddle it in any way whatsoever. This card here involves a man by the name of Art Soulsby. Offhand, your Honor, I just can't tell you what the debt is for or who the original creditor was. I could, because we have our file number there and I could check it and see whether it is a doctor bill or a grocery bill or so forth and so on.

This man owes some sum of money to somebody in or [14] out of California on some debt. That has been assigned to us for collection. We use a written assignment. We must have and insist on a written assignment of every account that is turned over to us, grocery bills, doctor bills, garage bills, all that kind of thing.

We use this name Business Research with the Washington, D. C., address. We mail these cards out to these people after analysis of the account, where there has been no response or it might appear that the party has moved. The purpose is to locate the party and get as much information as

(Testimony of David Bernstein.)

we possibly can in order to make a recovery for the person, the creditor who has employed us.

These cards are sent out at our discretion, of course, in the different process of collection agency work.

Q. Mr. Bernstein, in Washington, D. C., you have an agent who receives these cards and when a sufficient number of them are received mails them to you? A. Yes, we mail them to him.

Q. You mail them to somebody?

A. He mails them, and then when the answers come back they are gathered and mailed back to us, that is right.

Q. That is Mr. Smith, isn't it?

A. I believe it is, yes, a telephone answering service there.

Trial Examiner Haycraft: What is the name of it? [15]

Mr. Brookfield: Mr. Smith in the Albee Building.

Trial Examiner Haycraft: Well, Smith is quite a common name. Does he have a first name?

Mr. Brookfield: Your Honor, I don't know. Mr. Bernstein can tell me, I think.

Trial Examiner Haycraft: Do you know what his name is?

The Witness: I don't know his first name. Mr. Smith has no connection with us whatsoever, your Honor, except that he handles the mail passing to and fro. I don't know his first name. It is Mr. Smith all right.

(Testimony of David Bernstein.)

Trial Examiner Haycraft: How is he paid for what he does?

The Witness: We pay him so much a month regardless of the amount of business he handles for us in depositing these cards in the mail and when they come back mailing them back to us.

Trial Examiner Haycraft: Out of that he pays his own office rent?

The Witness: Well, do you want me to go into that, what little information I know about it? He has an office there where he handles telephone calls and letters for anybody who will pay him a fee of so much per month, that type of a set-up, where people do not have their own offices and stuff like that, and he perhaps might have five or six hundred [16] persons that he services not only in this respect but taking telephone calls and correspondence and telephone answering service, that type of thing. He has a very large plant, I understand.

Q. (By Mr. Brookfield): Mr. Bernstein, with reference to mailing these cards, why do you send them to Washington and use the name Business Research?

A. Well, just an idea, just an idea in the hope that we will get the information, because if we wrote to them in the name of the creditor or if we wrote to them in the name of the Affiliated Credit Exchange, they never would answer, and we are trying to find out where they live and where they work so we can take the matter up with them and find out why they don't pay their legitimate debts.

(Testimony of David Bernstein.)

Q. So that your purpose in using the name of Business Research with the Washington address is——

A. To get the information which is on that card.

Q. That you would not be able to get otherwise, is that correct, or that you don't think you would get so readily otherwise? A. Correct.

Q. You, of course, don't maintain any kind of business research offices or anything like that?

A. No, sir. [17]

Q. Your only business is the business of collecting accounts? A. Right.

Trial Examiner Haycraft: Do you have other offices located all over the country?

The Witness: No, sir.

Q. (By Mr. Brookfield): This is the only card which you have used since you have been using this form of tracing card, is that correct?

A. Yes, sir.

Trial Examiner Haycraft: Why do you use Washington, D. C.?

The Witness: Well, we use Washington, D. C. It is across the Continent. We have a lot of accounts in western states, Oregon, Washington, Wyoming, and so forth, and the remoteness of it, the possibility that coming from another area it will give us that information, as against using Los Angeles.

Q. (By Mr. Brookfield): It is a fact, is it not, that most of your debtors are in this area, in the western area? A. Yes.

(Testimony of David Bernstein.)

Q. In other words, the western states, California or nearby and bordering states?

A. Yes, the big percentage, yes, 90 per cent would be, yes.

Q. Whereas the creditors are located all over?

A. Well, the creditors are scattered about, [18] yes.

Trial Examiner Haycraft: Well, are the creditors located in the same general area as your debtors?

The Witness: Well, in the inception.

Trial Examiner Haycraft: That is what I mean.

The Witness: And then we find that debtor has moved from Wyoming to Arizona, or Arizona back to New Mexico, so it is one of those things. What we are doing, we are just chasing those debtors to catch up with them and make them pay their just debts.

Q. (By Mr. Brookfield): Mr. Bernstein, approximately, if you are able to tell me, how many returns would you get from, say, the mailing of 100 of those cards? Approximately what would be the percentage of returns?

A. Well, it seems that there is sort of a law of average on skip tracing methods, and if we average ten per cent on one form and ten per cent on something else, we figure that is a pretty good average, about ten per cent.

Q. So each ten of these that are mailed out you figure from your experience that you would receive about ten answers?

(Testimony of David Bernstein.)

Trial Examiner Haycraft: Each hundred you mean?

Q. (By Mr. Brookfield): Each hundred?

A. That is right.

Trial Examiner Haycraft: Does the fact, [19] Mr. Bernstein, that the Government sends out a lot of questionnaires from Washington, D. C., and other organizations there, have anything to do with your selection of Washington, D. C., as the place for the sending out of this questionnaire on this postal card?

The Witness: No, I don't think so, and if I could give an answer which might sound logical, it is this: That tracer forms have been used for many, many years, long before we got the idea of making up our own little device, and they all practically come from Washington, so we just put Washington on.

Trial Examiner Haycraft: Sort of a custom.

The Witness: Sort of a practice or a custom.

Trial Examiner Haycraft: Go ahead, Mr. Brookfield.

Q. (By Mr. Brookfield): Mr. Bernstein, along that line, you know it is a fact, do you not, that the Government does send out all kinds of forms?

Mr. Mooslin: I am going to object to that.

The Witness: I know that.

Trial Examiner Haycraft: I am sorry I started this line of examination. It occurred to me I had seen a lot of questionnaires going out of Washing-

(Testimony of David Bernstein.)

ton, and I thought maybe that was the reason. I think everybody knows that.

The Witness: Well, my answer to that would be—— [20]

Mr. Mooslin: Wait a minute.

Mr. Brookfield: I withdraw the question.

The Witness: Mr. Counselor, my answer to that would be this, that I can make this statement, that if all the Federal Trade Commission is worrying about is that I am mailing it from Washington, I am willing to mail it from Chicago, if that is the point involved. It never struck me that way before, and I can readily and easily shift to Chicago.

Mr. Brookfield: I can't be party to any agreements, of course.

The Witness: We rely a great deal on the wording of this card, so far as any attempts of misrepresentation, any foundation laid for misrepresentation that would make them think that this is from a Governmental agency, if that is the point.

Trial Examiner Haycraft: Off the record.

(Discussion off the record.)

Trial Examiner Haycraft: On the record.

Mr. Brookfield: Mr. Examiner, Mr. Mooslin and myself, in view of the answer previously filed, hereby stipulate that all of the facts in the first five paragraphs of the complaint, with the exception of what may be a conclusion, which is the first paragraph of Paragraph V, aforesaid representation and employment arising therefrom are

(Testimony of David Bernstein.)

false and misleading, that particular part of Paragraph V is [21] objected to as a conclusion rather than a fact, and with that exception the first five paragraphs of the complaint are stipulated.

Trial Examiner Haycraft: All right. Is that correct, Mr. Mooslin?

Mr. Mooslin: That is correct.

Trial Examiner Haycraft: I am very glad, however, that you did get Mr. Bernstein to explain the business. If he gives us a little background. I think I will be in a better position to render a decision in this case by this testimony.

Mr. Brookfield: If your Honor please, unless I have inadvertently overlooked anything in connection with Mr. Bernstein's operation, that is all the questions I have.

Trial Examiner Haycraft: Well, there was one thing I thought might possibly be shown, and of course it may be covered by the complaint, that is, how the collection is actually made. That is, does the money come direct from the debtor to Mr. Bernstein and does he take his commission out of that and forward the rest of it to the creditor?

Mr. Brookfield: I think, your Honor, to bring that in, which is part of their business, I think I will ask Mr. Bernstein that.

Q. (By Mr. Brookfield): Mr. Bernstein, those accounts that you handle, how are [22] they handled in your office? Do you purchase the accounts?

A. No, sir, they are assigned to us for the purpose of collection and our fees are specified in the

(Testimony of David Bernstein.)

written assignment. I believe I furnished your office with that.

Trial Examiner Haycraft: Do you have a copy of the written assignment?

Mr. Brookfield: Yes, sir. Would you like to have it in the record?

The Witness: We do not buy any accounts. I am not licensed, in fact, to buy accounts. We take them on a so-called contingent basis, your Honor.

Mr. Brookfield: Mr. Reporter, will you mark these Commission's Exhibits 7-A and B?

(The papers referred to were marked Commission's Exhibits Nos. 7-A and 7-B for identification.)

Mr. Brookfield: 7-A is a contract and 7-B is a list which is furnished with the contract, furnished by Mr. Bernstein to his creditors.

The Witness: I would like to use the word written power of attorney, instead of a contract, because that is all it is really. It is a written power of attorney to represent the man, don't you think so?

Q. (By Mr. Brookfield): Mr. Bernstein, I show you Commission's Exhibits 7-A and 7-B for identification and I will ask you to tell His [23] Honor whether you have seen those papers before and what is the nature of them?

Trial Examiner Haycraft: And what use he makes of them. I want to know what use do you make of them. Tell me what you use them for.

(Testimony of David Bernstein.)

The Witness: That is used to—the large sheet is what we call the listing.

Q. (By Mr. Brookfield): 7-B?

A. 7-B is the listing sheet. Do you want me to go into detail on that? Well, the member's name over here would be the client or the customer, the person, the creditor who turns over to us, whether it is a groceryman or doctor or a dentist or a garage operator, and so forth, who turns over those accounts. His accounts, the people who owe him money, the names are listed here and the addresses and locality, the city and state, the amount that is due, the date of last charge, and the kind of account, whether it was a note, a book account or a judgment or what have you, or any other information of this kind, and with that listing blank we list them right down, listing the name and address and the amount of the accounts the man turns over to us. That is the listing blank.

Trial Examiner Haycraft: Now the other?

The Witness: At the same time that this is [24] completed and everything is listed, before we budge we give the client a copy and he signs this for us.

Q. (By Mr. Brookfield): That is 7-A.

A. That is the assignment. That is the assignment. That is where the creditor vests in us certain rights and so forth, together with duties and obligations between us to go after these guys and collect the money for him. Is that clear?

Trial Examiner Haycraft: Yes. That is what I wanted.

(Testimony of David Bernstein.)

Mr. Brookfield: I ask that Commission's Exhibits 7-A and B be received in evidence.

Trial Examiner Haycraft: There will be no objection, Mr. Mooslin?

Mr. Mooslin: No objection.

Trial Examiner Haycraft: Commission's Exhibits 7-A and B for identification are received in evidence.

(The documents referred to, heretofore marked for identification Commission's Exhibits 7-A and 7-B, were received in evidence.)

COPY

AFFILIATED CREDIT EXCHANGE
EXECUTIVE OFFICES:
328 WEST THIRD STREET
LOS ANGELES 13, CALIFORNIA

1-1746/48
Alme

1-19911

In consideration of services to be rendered, the undersigned assigns to the Affiliated Credit Exchange, 328 West Third Street, Los Angeles, Calif., the accounts submitted herewith. The undersigned authorizes the Exchange to act as its attorney-in-fact, for him and in his name, place and stead, to collect and receive all sums of money which are warranted to be legally due and owing to the undersigned from the persons and in the amounts appearing on the list of accounts assigned herewith. Said list of accounts is declared to be a part of this agreement. The Exchange is empowered to endorse checks and all other forms of remittance and to adjust, settle, sue, and to perform all acts necessary for the collection and settlement of the accounts, with the distinct understanding that if there is no collection or settlement there is to be no commission charged.

The undersigned agrees to pay the Exchange a commission of fifty per cent of the first one hundred dollars collected in the aggregate, and twenty per cent thereafter, except on accounts that are traced, outlawed, forwarded, collected in installments, or through attorneys or legal action, the commission shall be fifty per cent. The undersigned agrees to pay the Exchange the full commission on all monies or its equivalent paid to the undersigned, or upon acceptance by the undersigned of a new obligation of debtor or when further proceedings are ordered held or stopped. Where the undersigned interferes with the collection of any account or fails to furnish evidence of indebtedness or proof of debt or fails to furnish information relative to direct payments made to the undersigned or where other forms of settlement are made, in such cases the commission of fifty per cent will be paid by the undersigned.

When any debtor makes payment direct to the undersigned or otherwise settles direct, the undersigned agrees to report same to the Exchange and the undersigned authorizes the Exchange to charge against any monies coming into its hands any monies due the Exchange from the undersigned. The undersigned agrees to furnish, in writing, a complete report of all monies paid to him in full or in part as well as all arrangements for the settlement of any account, of whatever nature, of all accounts, prior to a settlement or report by the Exchange. The Exchange likewise agrees to furnish reports, at any time, upon written request. A fee of fifty cents on each account listed is authorized to be deducted and paid to the Exchange out of any money recovered under this agreement for listing and/or tracing expenses advanced by the Exchange. All accounts assigned shall stand as security for commissions due the Exchange. All commissions are payable at Los Angeles, Calif. The Exchange agrees to release accounts not in the process of adjustment, collection, or settlement, upon written request. This agreement subject to approval and acceptance by the Exchange at Los Angeles, Calif.

No agent has authority to alter this agreement verbally or in writing or to make any agreement relative to terms of agreement or modes of collecting or to receive or to receipt for any money from debtors or the undersigned and the Exchange is not bound by any other stipulation or representation.

ALL COURT COSTS, ATTORNEY FEES AND COLLECTION EXPENSES TO BE PAID BY DEBTOR TO THE EXCHANGE

Kind of business _____
Name of firm _____
Signed by 11/4/50 _____
Witness _____
Title _____
Date _____

MEMBER'S NAME

BUSINESS

ADDRESS

NAME OF REPRESENTATIVE

ATTACH PRINTED LETTERHEAD OR CARD
OF ADDRESS

NO.	NAME OF DOCTOR	STREET ADDRESS	CITY OR TOWN	RATE	Amount		Date of Last Change	Date of Last Exam	When Issued ¹ and Date of Expiration ² of License After Expiration Periods Indicate Expiration
					Balance	Cost			
1									
2									
3									
4									
5									
6									
7									
8									
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22									

Perman 10-12-1941
1-1941

FEDERAL TRADE COMMISSION
DOCKET NO. 5804
IN THE MATTER OF *Perman*
DATE 4/6/50
EXHIBIT NO. 7B
EXHIBIT NO. 7B
EXHIBIT NO. 7B

Do not send us any duplicate or duplicate claims. Send us
no evidence the validity of which you could not prove in.

NO COLLECTION — NO CHARGE

Do not list claims against doctors of unknown address.
Always give exact number.

(Testimony of David Bernstein.)

Trial Examiner Haycraft: Then when the money comes in, it is handled according to this agreement?

The Witness: That is right. That is right. Some debtors pay us, some debtors pay the client and the client [25] sends us our commission or vice versa, make reports to us, statements a month later, twice a month or whatever it might be. It is a traffic back and forth.

Mr. Brookfield: I have no other questions.

Trial Examiner Haycraft: Mr. Mooslin, do you have anything you want to ask?

Mr. Mooslin: Just a couple of questions.

Cross-Examination

By Mr. Mooslin:

Q. The solicitors or the men that pick up the account, are they paid on an hourly basis, a monthly basis, or on a piece basis?

A. Well, they are not paid on any hourly basis or monthly basis. As I said, they are not paid anything only on the basis of the number of accounts pursuant to classification. We pay more for MD accounts than we do garage accounts. We pay more for hospital accounts.

Q. There is a set price per account?

A. Yes, we have a rate schedule. I think you have a copy of that.

Trial Examiner Haycraft: Do you have any agreement, form of agreement?

(Testimony of David Bernstein.)

Mr. Brookfield: With the salesmen?

Trial Examiner Haycraft: Yes.

Mr. Brookfield: I don't think so. [26]

Trial Examiner Haycraft: With the solicitors.

Q. (By Mr. Mooslin): In other words, your solicitor does not have an interest in your collection of the account at all?

A. No, no. As a demonstration of that point, if it will clarify for His Honor, this, on hospitals we pay a dollar a name. A man gets a hundred accounts today and sends the business in and it is all set up so we can read it and sign it properly and so forth, we will air mail him a check for a hundred dollars, regardless of whether we collect an account on the entire list or whether we collect ten thousand on the list.

Q. That is what I wanted. Now, do your clients know that you utilize this form?

A. Nobody knows it.

Q. Do you inform your clients by way of an inducement that you have a peculiar or particular method of locating people? A. No, sir.

Q. Therefore you can service their accounts better than someone else because of your skip tracing form? A. No, sir.

Q. You use this but you don't sell it?

A. Don't give it away, don't sell it, don't peddle it in any manner, shape or form. We print them ourselves and so forth. [27]

Q. Do you use it for any other purpose, that form, other than your own interest?

(Testimony of David Bernstein.)

A. No, none whatsoever, never.

Mr. Mooslin: That is all.

Mr. Brookfield: Mr. Haycraft, you asked me whether I had a copy of the form of agreement with the solicitors.

The Witness: I think I gave it to the investigator.

Trial Examiner Haycraft: Well, it is not going to be much assistance in this case.

The Witness: No, I don't think it would be.

Trial Examiner Haycraft: Do you have——

Mr. Brookfield: I have copies of the assignments and things like that by the creditors.

Trial Examiner Haycraft: As I understand it from what you have just said, the solicitors are paid according to the type of account and they are paid on a flat fee basis?

The Witness: Yes, sir. Do I make myself clear in that?

Trial Examiner Haycraft: I think you have.

The Witness: Garage accounts we will say we pay fifty cents a name. If he comes in with a hundred, I will pay him \$50.00.

Trial Examiner Haycraft: You have got to have more than the name. Don't you have to have something as a basis for later on entering into a contract with the creditor? [28]

The Witness: Well, we of course mean, when we say "name," we mean contract.

Trial Examiner Haycraft: That is, they give

(Testimony of David Bernstein.)

the names of the accounts as in Commission's Exhibits 7-A and B?

The Witness: That is it.

Trial Examiner Haycraft: The solicitor, the man who gets the account, he doesn't know them?

The Witness: He is there. He has the man right there.

Trial Examiner Haycraft: Is he authorized to sign for you?

The Witness: As far as I know he has never—in fact, he has no authority to sign. Nobody else does.

Trial Examiner Haycraft: It has to be submitted to you, he sends the names and the contract to you?

The Witness: We have a form in which we make a typewritten list in duplicate which we send back to our customer. That is of course another process I didn't think of.

Trial Examiner Haycraft: Well, what I am trying to find out now is what the solicitor has to do with obtaining this Commission's Exhibit 7-A and B.

The Witness: He sees that it is executed and the man signs it right there in front of him and after he gets the list he mails it to us. [29]

Trial Examiner Haycraft: Does he get all the information, whatever is necessary?

The Witness: That is right, what we term the debt, whatever it may be for, and that sort of thing, that is right.

(Testimony of David Bernstein.)

Trial Examiner Haycraft: Then he doesn't sign anything?

The Witness: No, we acknowledge it from our office, because we make a duplicate list and send it back to the customer. That happens once in a while.

Trial Examiner Haycraft: And the name of the representative who solicited the accounts appears in the upper right-hand corner of 7-B, is that right?

The Witness: He must write his name in there, that is right. Then you have also the commission shown that he makes. We write the lists out and pay him by the number of accounts.

Trial Examiner Haycraft: All right. Is there anything else?

Mr. Brookfield: I have nothing further, your Honor.

If there are any of these other forms that you think should be in the record in order to make the story complete and Mr. Bernstein will send them to me, I think Mr. Mooslin and I can stipulate that they can be added to the record, if you so [30] desire.

Trial Examiner Haycraft: Well, that is up to you, if you want to do that.

Mr. Brookfield: I don't know of any other form except the ones you have inquired about. So with that I rest.

Trial Examiner Haycraft: And you rest, also?

Mr. Mooslin: Yes, we rest, also.

(Testimony of David Bernstein.)

The Witness: Might I say one thing?

Trial Examiner Haycraft: You may if you think your attorney will allow you.

The Witness: May I see one of those cards again, your Honor?

Trial Examiner Haycraft: I will give you the one that you talked about before.

The Witness: I think the main point has been overlooked. Pardon me, gentlemen. You know it has come up before in some of these things, the use of Washington, D. C., is an innuendo that we are resorting to a subterfuge. That is the basis of the whole thing, together with the fact whether as the collection agency operator I am engaged in interstate commerce.

There are two things to be proven in this case: First, subterfuge; and, second, interstate commerce. Now, I wouldn't say that the fact that this is mailed from Washington, D. C., on examination of this and the language therein, I [31] personally fail to see the claimed subterfuge that the Commission is sort of hanging its hat on now. On the question of subterfuge or any question in reference to subterfuge, that you have been asking me, if it is because I mailed them in Washington, D. C., my answer, if that is what you refer to, I will change it and mail them from Chicago.

Trial Examiner Haycraft: Why not from Los Angeles where you live?

The Witness: Why can't I mail them from Chicago if I am engaged in interstate commerce?

(Testimony of David Bernstein.)

Trial Examiner Haycraft: You are not located in Chicago.

The Witness: That point I am unprepared to argue, your Honor. I don't know anything about the law on that subject, but I will argue now about subterfuge in the language.

Trial Examiner Haycraft: I think that probably is the purpose of it.

The Witness: Pardon?

Trial Examiner Haycraft: I think probably that is the purpose of it. As I say, I am a little at a loss in this type of case myself.

The Witness: In the collection business you have to allow us a little bit of subterfuge to catch up with people who are a little bit backward and hesitant on paying just debts and move away, you have to allow us a little bit of that [32] thing you might call subterfuge.

Mr. Mooslin: Mr. Bernstein, excuse me for interrupting, but isn't it a matter of fact that you use a good deal of psychology in obtaining the information from the debtor?

The Witness: That is what the business is.

Mr. Mooslin: Doesn't the psychology of him receiving a card from out of the state, where a debtor knows that he is not lead him to believe that he has nothing to be afraid of in giving the information? Isn't that the psychological factor and the purpose of using the out-of-state card rather than that of a local card, where he might possibly suspect that someone is wanting to know his address?

(Testimony of David Bernstein.)

The Witness: Well, it brings me back to the same proposition there. If that is all the Federal Trade Commission wants, I will change the address. I will mail them from Washington, but that is not the point. The point is I am engaged in interstate commerce. That is not the point. I fail to see where an analysis of this card in the light of the way it is used and the historical background of the collection agency business, where there is subterfuge. There is nothing in there which would indicate any possibility of any connection with any governmental agency because it is Washington, D. C.

Trial Examiner Haycraft: Well, if there is nothing [33] else we will close the hearing, that is, close the taking of testimony at this place. When I get back to Washington, I will close the case formally, and if you do want to send me any other papers that you can find, Mr. Mooslin, I will put them in. I don't think it is necessary. I think we have all the facts.

Mr. Brookfield: Your Honor, the only other paper that I think would be pertinent, on the question that Your Honor asked Mr. Bernstein, would be that one you referred to, the contract with his solicitors.

The Witness: What would be material about that? If you want it you can have it. I will be glad to mail it to you.

Trial Examiner Haycraft: I will close the taking of testimony at this time and finally close the

case when I get back to Washington, and it will then take its usual course in being decided. I write what is known as the initial decision in this case. Before doing that, if counsel wish, I am required under the rules to extend you an opportunity to file with me a proposed finding and order. Now, if you wish to avail yourselves of that privilege you may do that under the rules.

Mr. Brookfield, counsel, has an opportunity, will have an opportunity to file with the Trial Examiner his proposed findings and order. If you want to take advantage [34] of that, I will give you from now until the first of December. Will that be long enough?

Mr. Mooslin: That will be satisfactory.

Trial Examiner Haycraft: The first of December to file with me your proposed findings and order, and thereafter I will close this case.

Mr. Brookfield: I will be back in Washington about the same time you are. I imagine that will be time enough for me.

Trial Examiner Haycraft: I think this is not a very difficult case, I wouldn't think.

Mr. Mooslin: A copy of the proposed finding will be served on Mr. Brookfield as well?

Mr. Brookfield: Well, you need not serve it, only send it to the Commission.

Trial Examiner Haycraft: You just include the necessary copies and they will send him a copy. The rules provide that ten copies should be filed. You might make that for—well, probably you bet-

ter make it ten. I am not going to try to change the rules of the Commission.

Mr. Mooslin: I will send ten.

Trial Examiner Haycraft: After you have done that I will close the case and render the initial decision. Then you still have the right to appeal from my decision to the Commission, and if you want to argue it you have the right to [35] appear before the Commission. You have that right.

Mr. Mooslin: We might also permit you to make your initial decision without filing any briefs or filing any objections to your initial decision and wait until the Commission issues its final order and then appeal directly from that order.

Trial Examiner Haycraft: Yes, you have the right to do that.

Mr. Mooslin: We have the right to do that. Thank you.

Trial Examiner Haycraft: If you want to make the stipulation now it would simplify things in the future.

Mr. Mooslin: I can't see any purpose in filing any further briefs on the matter or appealing from the initial decision or the right to object to the initial decision, but I reserve the right to appeal from the final order.

Trial Examiner Haycraft: Well, you have that right.

Mr. Mooslin: We have the right to do that without laying a foundation for the appeal by the filing of other documents?

Trial Examiner Haycraft: No, you have the

right to waive, if you desire, the appeal from the Trial Examiner's initial decision, you may waive that. [36]

Then you have the right under the law to appeal to the Court from the finality of that decision. Here is the way that will work: After the Trial Examiner's initial decision is served upon you, about 30 days later you will get another order from the Commission, not from me, in which the Commission calls attention to the fact that 30 days have expired so that that initial decision has become effective under operation of law, and then they give you 60 days within which to file your appeal to the Court. If you do not file within 60 days, then it becomes final and it stands.

Mr. Mooslin: It is not appealable at that time.

Trial Examiner Haycraft: If you desire at this time to waive the intervening procedure in the way of appeal——

Mr. Mooslin: No, I don't want to waive it at this time. I can waive it, I suppose, by failing to do so, and I will have to wait, but I do not desire to waive it at this time because I don't know whether I want to do it or not.

Trial Examiner Haycraft: I would appreciate if you filed your proposed findings if you give them in a simple way, limiting them to a general finding. If you wish you may waive that. If you waive the proposed findings, you have your further appeals after the Commission's order is entered. It will help us a little bit.

Mr. Mooslin: I shall probably file objections to

the findings of the Trial Examiner, because the findings of [37] the Board are generally identical with those of the Trial Examiner.

Trial Examiner Haycraft: Well, that depends. I think in a case of this kind it would be. I don't think there would be much chance——

Mr. Mooslin: Well, in other words, objecting to one would serve as an objection to all.

Trial Examiner Haycraft: Well, you have that opportunity, and you just do as you please about it. Then the hearing stands closed.

(Whereupon, at 10:55 a.m., November 6, 1950, the hearing in the above-entitled matter was closed.) [38]

CERTIFICATE

United States of America,
Before Federal Trade Commission—ss.

I, D. C. Daniel, Secretary of the Federal Trade Commission and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above-entitled matter.

That this transcript is certified to the United States Court of Appeals for the Ninth Circuit, pursuant to the filing in said Court of a petition for review of a Decision of the Commission; Findings as to the Facts, Order to Cease and Desist and Order to File Report of Compliance dated July 9,

1951, issued by the Federal Trade Commission in the above-indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 1st day of November, A. D. 1951.

[Seal] /s/ D. C. DANIEL,
Secretary.

[Endorsed]: No. 13104. United States Court of Appeals for the Ninth Circuit. David Bernstein, Trading as Affiliated Credit Exchange and Business Research, Petitioner, vs. Federal Trade Commission, Respondent. Transcript of the Record. Petition to Review and Set Aside Order of the Federal Trade Commission.

Filed November 6, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 13104

DAVID BERNSTEIN, Trading as Affiliated
Credit Exchange and Business Research,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION TO REVIEW AND SET ASIDE
ORDER OF THE FEDERAL TRADE COM-
MISSION

To Honorable Judges of the United States Court
of Appeals for the Ninth Circuit:

Your petitioner, David Bernstein, trading as
Affiliated Credit Exchange and Business Research,
respectfully shows:

I.

That your petitioner is now and at all times since
the commencement of proceedings on the complaint
of respondent as heretofore set forth, has been an
individual trading under the names of David Bern-
stein, doing business as Affiliated Credit Exchange,
having his office and principal place of business in
the City and County of Los Angeles, State of Cali-
fornia, and carrying on a business of Collection
Agency; that in addition thereto your petitioner has
used in the past a certain postcard designed for his

own use as a Collection Agent in obtaining information from and concerning debtors; that your petitioner by means of an agent in Washington, D. C., mailed said postcards from Washington, D. C., to the various debtors, and that your petitioner uses the name Business Research on the return postcards with the return address in Washington, D. C.

II.

On September 5, 1950, the respondent, Federal Trade Commission, issued its complaint against David Bernstein in a proceeding entitled "In the Matter of David Bernstein, trading as Affiliated Credit Exchange and Business Research" charging petitioner with having violated provisions of the Federal Trade Commission Act.

The complaint before the Federal Trade Commission, hereinafter referred to as the Commission, among other things, and, in substance, charged that petitioner does business under the name of Affiliated Credit Exchange and Business Research and is engaged in conducting a collection agency and in collecting accounts owed to others upon a commission basis contingent upon collection and that many of the accounts were sent to petitioner from persons residing in states other than California and that, further, in the course of petitioner's business in attempting to ascertain the current address of persons from whom he is endeavoring to collect money due to his clients, the names and addresses of employers of such persons and other information about such persons. The complaint further sets

forth the printed portions of said postcards and charges that by means of those postcards and through the form and phraseology of those postcards represents that he is engaged in conducting a business research bureau or office or in compiling business and labor statistics and that the information requested is for such purpose. That said representations and implications were false and misleading and that petitioner was not conducting and in no way was connected with any research bureau or labor statistical office and that petitioner's business and the sole purpose in sending such cards was in connection with the collection of accounts and that the uses of said cards has and has had the capacity and tendency to mislead and deceive, and has misled and deceived many persons to whom the said cards were sent and that the erroneous and mistaken belief that the trade names used by petitioner indicated the true nature of his business; that he was engaged in conducting a research bureau or office or in compiling business and labor statistics and induced the recipient thereof to give information to petitioner which otherwise they would not have supplied; that the aforesaid acts and practices of petitioner as therein alleged are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

III.

Petitioner filed his answer herein (1) petitioner

admitted all the material allegations of fact charged in the complaint; (2) denied that he was engaged in interstate commerce; (3) and, further, alleged that the Federal Trade Commission lacked jurisdiction over this petitioner and that the Federal Trade Commission Act did not apply to this petitioner.

IV.

A hearing was held before a trial examiner appointed by the Federal Trade Commission on November 6, 1950, in Los Angeles, California, and that said trial examiner made his report on the evidence and on the 22nd day of December, 1950, the Commission issued its "Findings as to the Facts and Conclusion" and "Order to Cease and Desist." On January 16, 1951, petitioner caused to be filed his Notice of Intention to Appeal to the Federal Trade Commission and on February 5, 1951, petitioner caused to be filed herein his Appeal Brief together with a statement of the points upon which appellate intended to rely, copies of which were served upon the Commission.

That thereafter, on July 9, 1951, the Federal Trade Commission did issue its order sustaining in part respondent's appeal (petitioner herein) from initial decision of trial examiner.

V.

The petitioner herein seeks to set aside the Cease and Desist Order issued by the Federal Trade Commission on December 22, 1950, and that portion of the Order issued July 9, 1951, denying in part

respondent's appeal from initial decision of trial examiner.

That the Cease and Desist order of December 22, 1950, reads as follows:

“It Is Ordered that the respondent David Bernstein, an individual trading and doing business as Affiliated Credit Exchange and Business Research, his representatives, agents, employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of a collection system, including the use of double postcards, form letters or other written or printed material, or similar devices in taking on the business of collecting or aiding in the collection of accounts or debts, in commerce as “commerce” is defined in the Federal Trade Commission Act do forthwith cease and desist from:

1. Using the words Business Research or any other words of similar import to designate, describe or refer to respondent's business or otherwise representing, directly, or by implication that respondent is engaged in research in business or other forms of research.

2. Representing that respondent's said business is other than that of collecting accounts or debts or that the information sought by means of respondent's devices is for any purpose other than for the use in collection of accounts or debts.

3. Representing that respondent's business is located in Washington, D. C., or any other place

than where it is actually located for the purpose of misleading the debtors as to respondent's place of business."

That the Cease and Desist order issued July 9, 1951, modifies, in part, the order of December 22, 1950, in that said latter order acknowledges that petitioner does not sell or offer for sale said double postcards, and that said order as modified reads as follows:

"Is Is Ordered that the respondent, David Bernstein, an individual trading and doing business as Affiliated Credit Exchange and as Business Research, or trading under any other name or trade designation, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the use of post cards or other written or printed material in carrying on the business of collecting or aiding in the collection of debts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Business Research," or any other word or words of similar import, to designate, describe or refer to the respondent's business; or otherwise representing, directly or by implication, that the respondent is engaged in research in business or in other forms of research.

2. Representing, directly or by implication, that the respondent's said business is other than that of collecting accounts or debts, or that the information

sought by means of the respondent's devices is for any purpose other than for use in the collection of accounts or debts.

3. Representing, for the purpose of misleading debtors or others as to the respondent's place of business, that his business is located in Washington, D. C., or any other place than its actual location.

It Is Further Ordered that respondent shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

VI.

That the said "Findings as to the Facts" of said Commission are, in material and controlling respects, without support in the evidence received by the said Commission in said proceeding, but are contrary to such evidence; that said "Conclusion" is not supported by the findings or by the evidence received by the said Commission; that the Orders entitled "Order to Cease and Desist" are not supported by the record before the said Commission in said proceeding and are beyond the authority and jurisdiction of said Commission, and that in particular;

1. There is no evidence in the record to show that petitioner solicits for collection certain accounts from business and professional individuals, partnerships and corporations located in various states of the United States other than California;

2. That the activity of petitioner as shown by the records does not place him within the jurisdiction of the Federal Trade Commission as there is no showing that the petitioner is engaged in interstate commerce;

3. That under the proofs adduced before said Commission in said proceeding, said Commission was without authority or jurisdiction to enter any order respecting petitioner other than an order dismissing the complaint.

VII.

That the said Federal Trade Commission erred in taking or purporting to take jurisdiction over your petitioner by the issuance of its said "Order to Cease and Desist" is erroneous, contrary to law, and wholly void.

Wherefore, your petitioner prays this Court to review and set aside said order.

Respectfully submitted,

/s/ DAVID BERNSTEIN,

An Individual Trading Under the Names Affiliated
Credit Exchange and Business Research.

Dated Los Angeles, California, the 17th day of
September, 1951.

CARL J. MOOSLIN,

Attorney for Petitioner.

United States of America,
Southern District of California,
City and County of Los Angeles—ss.

David Bernstein, being first duly sworn, deposes and says:

That he is the petitioner named in the above-entitled matter and in the foregoing Petition to Review and Set Aside Order of Federal Trade Commission.

That he has read said Petition and knows the contents thereof and the same is true to the best of his knowledge, information and belief.

/s/ DAVID BERNSTEIN.

Subscribed and sworn to before me this 17th day of September, 1951.

[Seal] /s/ CONSTANTINE M. MOOSLIN,
Notary Public.

[Endorsed]: Filed September 19, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF THE POINTS UPON
WHICH APPELLANT INTENDS TO RELY

To the Clerk of the Above-Entitled Court, and to
the Federal Trade Commission:

Pursuant to Subdivision 6 of Rule 19 of the above-entitled Court, the above-named petitioner submits herewith his statement of the points upon

which he intends to rely in support of his Petition to Review and Set Aside Order of Federal Trade Commission against him:

I.

That the said "Findings as to the Facts" of said Commission are, in material and controlling respects, without support in the evidence received by the said Commission in said proceeding, but are contrary to such evidence; that said "Conclusion" is not supported by the findings or by the evidence received by the said Commission; that the Order entitled "Order to Cease and Desist" is not supported by the record before the said Commission in said proceeding and is beyond the authority and jurisdiction of said Commission; that in particular, no proof was introduced or adduced to show that petitioner was engaged in Inter-State Commerce.

II.

That in making, entering and publishing its said "Order to Cease and Desist" the said Federal Trade Commission erred in concluding that the acts and practices of the petitioner herein constituted use by petitioner in Inter-State Commerce within the intent and meaning and in violation of the provisions of Section 5 of the Federal Trade Commission Act.

III.

That no proof was adduced in said proceeding before the said Federal Trade Commission showing or tending to show that your petitioner has com-

mitted any act or acts, or engaged in any practice or practices prohibited by the provisions of Section 5 of said Federal Trade Commission Act, or that your petitioner has committed any other act or engaged in any other practice cognizable by the said Federal Trade Commission under the said Federal Trade Commission Act, or warranting the issue by said Commission of its said "Order to Cease and Desist"; that under the proofs adduced before said Federal Trade Commission in said proceeding the said Commission was without authority or jurisdiction to enter any order respecting your petitioner other than an order dismissing its said Complaint.

IV.

That the said Federal Trade Commission erred in taking or purporting to take jurisdiction over your petitioner by the issuance of its said "Order to Cease and Desist" is erroneous, contrary to law, and wholly void.

Dated: Los Angeles, California, this 16th day of November, 1951.

CARL J. MOOSLIN,
Attorney for Petitioner.

To the Clerk of the Above-Entitled Court:

The petitioner named in the foregoing statement hereby desires the record in said proceeding as certified by you, printed in its entirety, and hereby designates for printing the entire transcript.

Dated November 16th, 1951.

/s/ CARL J. MOOSLIN,
Attorney for Petitioner.

Return of service attached.

[Endorsed]: Filed November 19, 1951.

In the United States Court of Appeals
for the Ninth Circuit

DAVID BERNSTEIN, trading as AFFILIATED CREDIT
EXCHANGE and BUSINESS RESEARCH, *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

On Petition to Review an Order of the Federal Trade Commission

BRIEF FOR RESPONDENT

FILED

APR 16 1952

AUL P. O'BRIEN
CLERK

W. T. KELLEY,
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JAMES W. CASSEDY,
Assistant General Counsel,

JNO. W. CARTER, JR.,
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Trade Commission.*

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OTHER AUTHORITY:

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 13104

DAVID BERNSTEIN, trading as AFFILIATED CREDIT
EXCHANGE and BUSINESS RESEARCH, *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

On Petition to Review an Order of the Federal Trade Commission

BRIEF FOR RESPONDENT

I

STATEMENT OF THE CASE

This is an administrative law proceeding arising upon petition to review and set aside an order to cease and desist (R. 42-43) issued by the Federal Trade Commission, respondent, pursuant to a Commission complaint (R. 3-7) charging petitioner with engaging in unfair and deceptive acts and practices "in interstate commerce in violation of the Federal Trade Com-

mission Act.” The proceeding below conforms to all the requirements of, and was in full and complete compliance with, the applicable provisions of the Federal Trade Commission Act and the Administrative Procedure Act.

In substance the charge was that in operating his collection agency petitioner falsely represented his business status for the purpose of obtaining information of a personal nature from alleged delinquent debtors which but for the false representation such debtors would not have supplied. There is neither a conflict in the evidence nor dispute as to the facts. The facts found by the Commission (Paragraph One-Six, Findings as to the Facts, R. 38-42) are based upon (1) admission answer (R. 13); (2) testimony of petitioner (R. 46-87); (3) Commission’s Exhibits 1A-1B, 2A-2B, 3, 4, 5, 6 and 7 (R. 55-64); and Commission’s Exhibits 7A-7B (R. 76-77); and (4) stipulation entered of record (R. 71-72). We might at this point call the Court’s attention to the fact that in his brief (page 5) petitioner tells the Court that he does not question or challenge the findings of fact set forth in Paragraphs One through Six of the findings as to the fact (R. 38-42). The order to cease and desist is based upon these findings and these findings only. Petitioner does attempt to challenge, however, the conclusion made by the Commission (R. 42) that the admitted acts and practices constitute unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act. We shall, therefore, as briefly as possible, summarize the admitted and unchallenged findings of fact made by the Commission.

Petitioner is an individual engaged in the business of operating in interstate commerce a collection agency under the name Affiliated Credit Exchange. He also uses for certain purposes the name Business Research. His principal office is in Los Angeles, California. He secures business by two methods: (1) listings in recognized license books and (2) through representatives or solicitors who travel in various states and solicit accounts for collection (R. 47-50).¹

Petitioner furnishes the solicitors with assignment contract forms (Comm. Ex. 7A) and forms (Comm. Ex. 7B) for listing each account assigned (R. 63-70). These representatives or solicitors secure or obtain from various creditors, residing in California and in states other than the State of California, the assignment of accounts for collection to petitioner. These accounts are against debtors residing in the State of California and in states other than the State of California and are listed on the blank form or listing sheet (Comm. Ex. 7B) showing the name of the debtor, address, amount and nature of the debt and other pertinent information. This listing sheet is then attached to the contract of assignment (Comm. Ex. 7A). The creditor executes the contract assigning to petitioner for collection on a commission basis all of the accounts so listed. He delivers the contract to the solicitor. The solicitor mails the executed contract and

¹ The record discloses that these solicitors are independent contractors. Their compensation is based upon the type of accounts which by their efforts are assigned to petitioner for collection by creditors residing in California and in states other than the State of California.

list of accounts to petitioner at his place of business in Los Angeles, California (R. 81-83).

Petitioner thus receives business from clients (creditors) residing in states other than the State of California. This business is against debtors similarly located. In the course of operating his collection agency in Los Angeles, California, petitioner receives money from debtors located in states other than the State of California and transmits money to and receives money from clients (creditors) located in states other than the State of California (R. 50; 68-69; 79).²

When petitioner receives an assignment of accounts from a creditor, the accounts are analyzed. If a debtor has not responded to the creditor or there is an indication that a debtor has moved, petitioner attempts to locate the debtor, using for this purpose a post card of the double-type variety; one card is addressed to the debtor, the return card is addressed to petitioner under the name Business Research, Washington, D. C. Petitioner mails these addressed cards in bulk to his agent in Washington, D. C. (R. 51-52; 54-56). This agent mails the cards to the individual debtors so that the cards will bear the Washington, D. C. postmark (R. 66). The cards thus go to addressees located in various states of the United States. The card addressed to the debtor has the following return address:

² Petitioner testified that some debtors pay direct to his client. The client sends petitioner his commission. "It is a traffic back and forth" (R. 79).

“Return to

Business Research,
703 Albee Building,
Washington 5, D. C.”

The message addressed to the debtor reads as follows:

Washington, D. C.

“To addressee:

To enable us to complete our records it is necessary that you furnish the information requested on the attached card.

Do this at once and mail to us.

Business Research
by D. Bernstein.”

The attached card or reply part of the postal card addressed to “Business Research, 703 Albee Building, Washington 5, D. C.”, is intended to be detached, filled out, signed and mailed by the debtor. The form to be filled out is as follows:

Subject
Subject's Address
Subject's Employer
Address
Monthly Salary Does this include
room, board or services?
Employed since (approximate date)
Own home? Rent? Own auto?
If Married, spouse's name
Spouse's employment, if any
Number of dependents
Your name

Along the right side of this return card appears a box of abbreviated figures and various numbers. This is similar in appearance to punch cards, commonly used for statistical purposes. (See Comm. Ex. 1A-1B, 2A-2B). When petitioner's agent in Washington, D. C. receives the "reply part of the postal card" the agent mails these cards to petitioner's place of business in Los Angeles, California (R. 66).

Petitioner does not conduct and is in no way connected with any business research bureau or office or in compiling business and labor statistics. Petitioner has no office in Washington, D. C. He merely employs an agent for the sole purpose of mailing from Washington, D. C. the double post cards to the debtors, and mailing to petitioner at his address in Los Angeles, California, the reply card when received in Washington, D. C. (R. 66-68).

Through the use of the name Business Research and the form and phraseology of the postal card petitioner falsely represented that he was engaged in conducting a business research bureau or office or in compiling business and labor statistics and that the information requested of debtors was for such purposes. The sole purpose for sending the postal cards was in connection with the operation of petitioner's business in the collection of delinquent accounts (R. 51; 54-56). The use of such post cards for such purposes has and has had the capacity and tendency to mislead and deceive persons into the erroneous and mistaken belief that petitioner was engaged in conducting a research bureau or office, or in compiling business and labor statistics. This induced the recipients of the cards to give infor-

mation to petitioner which otherwise they would not have supplied (R. 68). The sole purpose of the use of such subterfuge was to locate the debtors, get as much information as possible in order to make a recovery of money for the creditor who employed petitioner for that purpose (R. 65-66, 85). If petitioner had written to them in the name of the creditor or even in the name of Affiliated Credit Exchange the debtor would not have replied (R. 67).

Upon the basis of those facts the Commission concluded (R. 42) that petitioner had violated the Federal Trade Commission Act and ordered him in connection with operating his business of collecting debts in interstate commerce to cease and desist from:

1. Using the word "Business Research", or any other word or words of similar import, to designate, describe or refer to the respondent's business; or otherwise representing, directly or by implication, that the respondent is engaged in research in business or in other forms of research.

2. Representing directly or by implication, that the respondent's said business is other than that of collecting accounts or debts, or that the information sought by means of the respondent's devices is for any purpose other than for use in the collection of accounts or debts.

3. Representing, for the purpose of misleading debtors or others as to the respondent's place of business, that his business is located in Washington, D. C. or any place other than its actual location.

Petitioner thereafter filed his petition to review and set aside the Commission's order (R. 92-99) and filed his statement of points relied upon (R. 100-103).

II

QUESTION PRESENTED

We find petitioner's brief somewhat confusing and in some respects contradictory. We believe this to be due to petitioner's lack of familiarity with administrative procedure such as is here involved. Petitioner fails to distinguish between the initial decision handed down by the trial examiner (R. 26-32), the interlocutory decision handed down by the Commission on petitioner's appeal from the initial decision of the trial examiner (R. 34-36) and the ultimate and final determination of this case on its merits by the Commission (R. 37-43).³

In this connection we believe it would be of benefit to the Court if, at this stage of our brief, we briefly outlined the procedure covering matters of this nature before the Commission. Under the Commission's Rules of Practice the hearing examiner must make and file his initial decision within thirty days from the date of the order closing the case before him. This initial decision must include findings as to the facts, conclu-

³ The ultimate and final decision of the Commission on the merits is the only decision which under the Federal Trade Commission Act is subject to review. However, when exceptions to, and an appeal from, the decision or ruling of a hearing examiner is made, the Court, of course, under its review powers can examine the interlocutory decision rendered by the Commission to determine if error was committed; and, if so, if the error is of such a nature as to materially affect the Commission's findings as to the facts and its order to cease and desist.

sions, as well as an appropriate order. It must be served upon the parties. This decision becomes the decision of the Commission thirty days from such service unless prior thereto (1) an appeal is filed under the provisions of Rule XXIII, (2) the Commission by order stays the effective date of the initial decision, or (3) the Commission on its own initiative places the case on its review calendar. The appeal referred to in Rule XXIII must be filed within ten days after service of the initial decision.⁴

Bearing the above procedure in mind the confusion and the contradictions appearing in petitioner's brief and argument will become plainly apparent.

On December 20, 1950 an order was entered by the trial examiner closing this case before him (R. 23) and on the 22nd day of December, 1950, the trial examiner handed down his initial decision containing findings as to the facts, conclusion, and order to cease and desist (R. 26-32). This decision was served upon respondent (petitioner) on the 8th day of January, 1951 (R. 33). After the service of the initial decision upon him, petitioner complied with the provisions of Rule XXIII of the Commission's Rules of Practice and perfected his appeal from the initial decision of the trial examiner (R. 32-33). Briefly, the grounds relied upon by petitioner in his appeal were: (1) "The order does not determine whether respondent [petitioner] is engaged in interstate commerce" but assumes that he is; and (2) the order is based upon an erroneous finding that

⁴ See Rule XXII, Rule XXIII, Rule XXIV and Rule XXVI of the Commission's Rules of Practice published in the Federal Register under date of April 28, 1950.

petitioner "offers for sale, sale and distribution of a collection system". On February 9, 1951 petitioner filed with the Commission his brief in support of this appeal—no oral argument was requested. Thereafter on the 9th day of July, 1951, the Commission handed down two separate but related decisions. One was interlocutory and one final. The interlocutory decision was a ruling by the Commission on petitioner's appeal from the initial decision of the trial examiner. Since the order to cease and desist made no determination of facts either as to jurisdiction or otherwise, the Commission treated the ground set forth by petitioner under (1) of its appeal as an exception to the trial examiner's conclusion, from the fact found by him, that petitioner's acts and practices constituted acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act rather than an exception to the order of the Commission. The Commission being of the opinion that the facts as found by the trial examiner supported his conclusion, jurisdiction was established. Petitioner's appeal in this respect was denied. The Commission was of the further opinion that the trial examiner's order to cease and desist should have prohibited petitioner's practices when used in connection with the collection of debts and not (as it did) when used in connection with the sale of a collection system. The Commission sustained petitioner's appeal in this respect (R. 34-36).

The final decision handed down on the same date was the Commission's ultimate and final determination of this case on its merits. This decision contained the Commission's findings as to the facts, the Commission's

conclusion and the Commission's order to cease and desist (R. 37-43). In the preamble to its final decision the Commission declared (R. 38) that the findings as to the facts, the conclusion drawn therefrom and the order to cease and desist contained in its final decision was "to be in lieu of the findings as to the facts, conclusion, and order included in the initial decision of the trial examiner". The initial decision of the trial examiner therefore never become final and never became the decision of the Commission. It is not before this Court on review except to the extent referred to in note 3, (*supra*, p. 8).

In his statement of points relied on (R. 101-104) petitioner sets forth four points upon which he intends to rely. All of these relate solely to the question of whether the findings of fact made by the Commission, its conclusion and the order to cease and desist based thereon are supported by substantial evidence. However, in his brief (p. 5) petitioner advises the Court that he "does not take exception to the findings of fact" made by the Commission, and, further than this, in his brief petitioner does not argue that any finding of fact made by the Commission is not supported by substantial evidence. It would seem, therefore, that petitioner has abandoned the alleged errors specified in his petition to review. *Donnelley v. United States*, 276 U.S. 505, 511 (1928).

Petitioner admits (Br. p. 1) that in the operation of his collection agency he uses misleading post cards (see Comm. Exs. 1A-1B, 2A-2B) for the purpose of obtaining information, necessary in the conduct of his collection agency, which otherwise he would not be able to ob-

tain. He contends (Br. p. 2) that since he does not sell or use these post cards in interstate commerce but confines their use strictly to his business and for his own benefit their misleading qualities are of no consequence. He admits, however (Br. p. 2), that if his business is in interstate commerce the Commission has jurisdiction to enter the order to cease and desist.

Petitioner says (Br. p. 3) that he is here seeking to have the Court set aside "the cease and desist order issued by the Commission on December 22, 1950". Petitioner here appears to be confused. As we have stated (*supra*, p. 9) the Commission did not enter any cease and desist order in this matter on December 22, 1950. It was on that date that the trial examiner handed down his initial decision. This decision never became final and never became the decision of the Commission for the reason that petitioner appealed therefrom (*supra*, p. 9).

Petitioner states (Br. p. 3) that he is here seeking to have set aside "that portion of the order issued July 9, 1951 denying in part his appeal from the initial decision of the trial examiner". This, as we have heretofore indicated, was an interlocutory decision of the Commission wherein the Commission denied that portion of petitioner's appeal that excepted to the trial examiner's finding that petitioner's business was in interstate commerce. This decision of the Commission is not reviewable under the Federal Trade Commission Act except to the extent as stated in note 3 (*supra*, p. 8).

On page 5 of his brief petitioner tells the Court that he does not question *any* finding of fact made by the

Commission.⁵ He does, however, challenge the conclusion of the Commission that his admitted misleading acts and practices constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Petitioner states (Br. p. 7) that he challenges the findings of fact made by the Commission in its decision on his appeal from the trial examiner's initial decision and also challenges the cease and desist order based on "said findings". The reason for this challenge says petitioner is that the findings made by the Commission in this decision "states facts not within the record of the trial examiner and deliberately omits" petitioner's testimony on his method of obtaining business. Here again petitioner shows confusion. This is in reality a challenge of the findings of fact made by the trial examiner. The Commission made no findings as to the facts, as that term is understood and used in the Federal Trade Commission Act, in its decision on petitioner's appeal; and, the Commission issued no order based upon any alleged findings of fact made in such decision. The findings of the trial examiner never became final. The cease and desist order entered by the Commission in this matter is not predicated upon any findings of fact made by the trial examiner. The order here is based upon the findings of fact and the conclusion contained in the Commission's ultimate and final determination of this matter on its merits.

⁵ All of the findings of fact of the Commission are contained in Paragraphs One through Six of the Commission's final decision handed down on July 9, 1951 (R. 38-42).

Petitioner then (Br. p. 8) states the issues as: (1) "Are the findings of the Commission in the order sustaining in part and denying in part [petitioner's] appeal from the initial decision of the trial examiner supported by the evidence" and (2) Does the Commission have authority or jurisdiction to enter the order to cease and desist?". He then specifies the error as "The findings and conclusion of the Commission hereinbefore referred to are erroneous". The reason for this, according to petitioner, being that there is no evidence in the record to show that he solicits for collection accounts from business and professional individuals, partnerships and corporations located in states other than the State of California. Here again apparently petitioner is referring to the Commission's decision (R. 34-36) on his appeal from the initial decision of the trial examiner (R. 26-32) and not to the findings as to the facts and conclusion (R. 37-42) made by the Commission on the merits. The decision of the Commission on petitioner's appeal is not a finding of fact as we have hereinabove indicated (*supra*, p.). The Commission made no finding whatever on solicitation, method of solicitation, or person solicited.

On page 9 of his brief under the heading "Argument" petitioner says "The Commission's findings are not supported by substantial evidence". This statement contradicts a prior statement made in his brief (p. 5) that he does not question any finding of fact made by the Commission.

In view of the confusion, inconsistencies and contradictions appearing in petitioner's brief; and, taking into consideration admissions made by petitioner in his

answer (R. 13), stipulation (R. 71-72), and brief (p. 5, 9); and, giving full weight and accord to that portion of his answer in which petitioner denied that his business is in interstate commerce, we believe that in his petition to review, points relied on and in his brief petitioner only intended to raise and actually present to this Court the issue of interstate commerce—even though he does not do so.

Therefore, if there is any question before this Court, we believe it can be stated as follows:

Whether petitioner's acts and practices, admitted by him to be misleading and found by the Commission to be unfair and deceptive, occurred in interstate commerce.

III ARGUMENT

Petitioner's Acts and Practices, Admitted by Him to be Misleading and Found by the Commission to be Unfair and Deceptive, Occurred in Interstate Commerce

Except in so far as petitioner attempts to question the Commission's conclusion that his admitted misleading acts and practices occurred in interstate commerce, there is no dispute as to the facts. The applicable law is well settled. The Commission's findings as to the facts if supported by substantial evidence are conclusive. The statute so provides, 52 Stat. 113; 15 U.S.C. 45(c), this Court has often so held,⁶ and petitioner so admits (Br. p. 9).

⁶*Jack Silverman, etc. v. Federal Trade Commission*, 145 F. 2d 751, . (C. A. 9, 1944); *Stanley Laboratories v. Federal Trade Commission*, 138 F. 2d 388, 393 (C. A. 9, 1943); *American Medicinal Products v. Federal Trade Commission*, 136 F. 2d 426, 427 (C. A. 9, 1943). Also see *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 52, 63 (1927).

The uncontradicted facts upon which the Commission based its findings as to the facts, its conclusion and issued the order are set out in our brief summary of the facts (*supra*, pp. 3-7). Briefly they are that petitioner conducts a collection agency with his principal office located in Los Angeles, California. His clients reside in states other than California and the accounts for collection are against debtors similarly located. He secures his business through the United States mails. He receives money from debtors located in states other than the State of California and transmits money to creditors similarly located; he also received money from creditors representing his commission on debts paid direct to the creditor. These creditors reside in states other than the State of California.

The record is uncontradicted that petitioner made use of the United States mail to obtain information from debtors in an attempt to collect money due his clients; that the postal cards used for this purpose were false and misleading in the manner found by the Commission. On the very first page of his brief petitioner tells the Court that he has not at any time ever contended that the postal cards used by him in interstate commerce were not deceptive or misleading. He admits that they were.

We therefore respectfully submit that in view of the uncontradicted evidence established by the Record the Commission could have made no other finding of fact, arrived at no other conclusion and the order to cease and desist was properly entered.

Under the heading "Argument" (Br. p. 9) petitioner admits that the findings of the Commission are

conclusive if supported by substantial evidence. He says he must demonstrate to the Court that the findings are not so supported. Then under the statement "Findings of the Commission are not supported by the record"⁷ petitioner states to the Court, without any citation to the record, that "The record clearly shows that independent contractors solicit the accounts in the various states and thereafter within the State of California sell such accounts to [him] for \$1 per name * * *"; and that the record shows that he corresponds with creditors in various states "to verify the assignment of the accounts * * * and to remit collections when made". This portion of petitioner's brief is similar to those portions hereinabove discussed. It is not only contradictory on its face but it is not completely accurate. Further and more important than this, it contradicts petitioner's sworn testimony on this subject.

Petitioner testified that he secures business in two ways: (1) by listings in recognized license books and (2) "We solicit by personal contact, men in the field" (R. 47). He said that the solicitors (independent contractors) were paid on the basis of a certain rate depending on the type of account secured (R. 49); that the creditors from whom he secures business are located within and without the State of California and that his business is against debtors similarly located (R. 50-51).

Petitioner further testified that he insists upon an assignment from the creditor of every account secured for collection (R. 65). When asked if he purchased the accounts, petitioner replied: "No, Sir, they are as-

⁷ This contradicts petitioner's admission (Br. p. 5) that he does not question any finding of fact made by the Commission.

signed to us for the purpose of collection and our fees are specified in the written assignment". He further stated: "We do not buy any accounts. I am not licensed, in fact, to buy accounts. We take them on a so-called assignment basis * * *". He stated that Commission's Exhibit 7A is a written power of attorney to represent the creditor (R. 72-73).

In the face of the sworn testimony of petitioner it is exceedingly difficult to understand how petitioner can now tell this Court that he purchases the accounts from independent contractors.

Further than this the statement as to how he secured accounts for collection is contradictory on its face. In one breath petitioner says he purchases the accounts and in the next he says he remits collections when made to creditors in the various states. If petitioner purchased the accounts they became his property and there would be no occasion to remit collections to anyone; nor would there be any occasion of corresponding with any creditor in reference thereto.

But even though petitioner's statement in this respect is true, it is of no consequence. The manner in which petitioner secured accounts for collection is neither material nor important here. There was no allegation in the complaint that petitioner's method of securing business was either unfair or deceptive. In fact, the complaint made no reference to petitioner's method of securing business. It was not an issue. The Commission therefore made no finding of any nature in reference thereto. It would therefore seem that petitioner is here complaining of a lack of finding rather than a finding not supported by evidence.

Petitioner then goes on to say that the conclusion of the Commission that his business is in interstate commerce is based "solely upon the fact that [he] uses the mail to communicate with creditors, debtors and to transport cards". He admits that such correspondence is in interstate commerce. However, relying on *United States Fidelity v. Commonwealth*, 129 S.W. 314 and *State v. Morgan*, 14 N.W. 314, petitioner seems to argue, or at least take the position, that his business is not in interstate commerce but is subject to state regulation. There is no merit to this and the authorities relied upon are not in point.

The *Fidelity* case and the *Morgan* case involved state revenue statutes and the question presented was whether persons doing business in the state and sending credit reports to persons outside of the state were subject to a state license tax. The Court held that such persons could not escape such license tax by hiding behind the shield of interstate commerce. Apparently taking great comfort from these state decisions, one handed down in 1891 and the other in 1910, ignoring the long line of decisions of the Supreme Court of the United States and of the various United States Courts of Appeals on interstate commerce,⁸ petitioner seems to attempt to say that the decisions in the *Fidelity* and *Morgan* cases overturn all Federal court decisions on interstate commerce, is controlling and binding in the instant case and, therefore, the Federal Trade Commission and this Court is without jurisdiction. Could any-

⁸ *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910); *Furst v. Brewster*, 282 U. S. 493 (1931) and many others. Also See *Hills Bros. v. Federal Trade Commission*, 9 F. 2d 481, 484 (C. A. 9, 1926).

thing be more astounding? The decision of the state court on questions raised under state revenue-producing statutes is a far cry from the jurisdiction of the Federal Trade Commission and a United States Court of Appeals under the provisions of the Federal Trade Commission Act.

The remaining portion of petitioner's brief is of like quality. It is a brain child of petitioner's confused thinking and inaccurate reasoning.

We believe that we have answered petitioner's brief at much greater length than it deserved. There is no merit to any of it. He obviously has abandoned completely all of the points raised and set forth in his petition to review, has argued new matters wholly irrelevant and factual matters not encompassed by the issues raised by the pleadings or in the findings made by the Commission.

IV

CONCLUSION

It is therefore respectfully submitted that the Commission's findings as to the facts and its conclusion that the acts and practices so found are unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act, is amply, wholly and completely supported by the record and that the order to cease and desist was properly issued. *Jack Silverman, etc. v. Federal Trade Commission*, 145 F. 2d 751 (C.A. 9, 1944).

The Commission, therefore, prays (1) that petitioner's brief be stricken; (2) the petition to review be dis-

missed; and (3) pursuant to the statute⁹ the Court enter its decree affirming the Commission's order and commanding petitioner to obey and comply therewith.

Respectfully submitted,

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JAMES W. CASSEDY,
Assistant General Counsel,

JNO. W. CARTER, JR.,
Attorney,

*Attorneys for Federal
Trade Commission.*

Washington, D. C.

APRIL 7, 1952.

⁹ 'To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission.' Federal Trade Commission Act, Sec. 5(c), 52 Stat. 113; 15 U. S. C. A. Sec. 45(c).

No. 13107

United States
Court of Appeals
For the Ninth Circuit.

BRUCE G. BARBER, District Director Immigration
and Naturalization Service,

Appellant,

vs.

LOPE M. VARLETA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

NOV 14 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

No. 30281—Civil

LOPE M. VARLETA,

Plaintiff,

vs.

BRUCE G. BARBER,

Defendant.

DESIGNATION OF RECORD ON APPEAL
AND AGREED STATEMENT OF FACTS
UNDER RULE 76 OF TITLE 28, USCA,
FEDERAL RULES OF CIVIL PRO-
CEDURE

It Is Hereby Stipulated and agreed between the parties hereto, by their respective attorneys duly authorized, that the pertinent facts on appeal are as follows, and that this matter may be submitted to the United States Court of Appeals for the Ninth Circuit under Rule 76 of the Federal Rules of Civil Procedure, and that this statement shall constitute the designated record on appeal and the points to be relied upon:

Plaintiff was born at Pandan Antique, Philippine Islands, on September 25, 1914, and was admitted to the Hawaiian Islands for permanent residence in the year 1931, as a National of the United States. He arrived in the Continental United States March 22, 1935, and was excluded from admission to the United States on March 27, 1935, by a Board of

Special Inquiry, as a stowaway (39 Stat. 887, 8 USC 153). Plaintiff was placed aboard a steamship for deportation to the Hawaiian Islands but escaped from the vessel on April 6, 1935, and made his way into the Continental United States where he has resided since that date. The plaintiff has been physically present in the United States since April 6, 1935, except for his temporary absences in pursuit of his calling as a seaman aboard American vessels. The plaintiff last entered the United States from a foreign port on November 22, 1947, at Norfolk, Virginia, seeking admission as a resident alien seaman returning to the United States. On September 29, 1950, plaintiff was accorded a deportation hearing by a Hearing Examiner for the Immigration and Naturalization Service, and on November 29, 1950, a warrant for his deportation was issued charging that at the time of his last entry at Norfolk, Virginia, November 22, 1947, that the plaintiff was not in possession of a valid Immigration Visa and not exempted from the presentation thereof.

While in custody of the Immigration and Naturalization Service pending his deportation from the United States, Plaintiff personally filed on January 9, 1951, a Petition for Writ of Habeas Corpus, and an Order to Show Cause was filed returnable on January 3, 1951. A continuance was granted and a Return to Order to Show Cause and a Memorandum of Points and Authorities were filed in the United States District Court, San Francisco, California, on February 6, 1951. Points and

Authorities were also filed by Counsel for plaintiff on that date, and on February 7, 1951, the matter was argued before the Honorable George B. Harris, United States District Judge in the United States District Court, San Francisco, California, and submitted.

The sole questions of law to be determined in this matter were:

(1) Whether Sections 8 A (2) of the Philippine Independence Act of 1934, was nullified on July 4, 1946, by the operation of Section 14 of that Act, after Presidential Proclamation No. 2695 was signed by the President of the United States, surrendering sovereignty of the United States over the Philippine Islands;

(2) Was the effective date of the Philippine Independence Act May 1, 1934; and

(3) Was the plaintiff required by law to present an Immigration Visa upon the occasion of his return to the United States as a bona fide seaman, at Norfolk, Virginia, on November 22, 1947?

The District Court, in a Memorandum Opinion dated June 15, 1951, held that Section 8 A (2) of the Philippine Independence Act of 1934, became a nullity on July 4, 1946, and that, therefore, plaintiff was not required to present an Immigration Visa at the time of his return to the United States as a seaman, at Norfolk, Virginia, on November 22, 1947. The Court concluded that the plaintiff was illegally restrained by the defendant.

Attached hereto and made a part of this Designation of Record on Appeal are the following:

- (1) Copy of Court's Memorandum Opinion.
- (2) Copy of the Final Decree Including Findings of Fact and Conclusions of Law.
- (3) Copy of the Notice of Appeal filed by Defendant June 21, 1951.
- (4) Copy of Order Extending Time to Appeal.

Statement of Points to Be Relied Upon
by Defendant

(1) The Court erred in finding that the plaintiff is a lawful permanent resident of the United States.

(2) That Court erred in finding that the deportation order of the Immigration and Naturalization Service, ordering the plaintiff's return to the Philippine Islands was erroneous.

(3) That the Court erred in finding that Section 8 A (2) of the Philippine Independence Act of 1934 is no longer effective.

CHAUNCEY TRAMUTOLO,
United States Attorney,

By /s/ EDGAR R. BONSTALL,
Assistant United States
Attorney,
Attorney for Defendant.

/s/ JOSEPH S. HERTOGS,
Attorney for Plaintiff.

Dated: September 18th, 1951.

Approved:

/s/ GEORGE B. HARRIS,

Judge, United States District
Court.

[Endorsed]: Filed September 18, 1951.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Petitioner, a native of the Philippine Islands, entered the Hawaiian Islands for permanent residence in 1931. On March 22, 1935, via the steamship Hanover, he entered the United States, in which country he has continuously resided except for periods of employment aboard American owned vessels.

Upon the return of petitioner's vessel from a foreign port on November 22, 1947, he was detained by the Immigration and Naturalization Service. Hearings by the latter body culminated in an order of deportation, directing petitioner to be sent to the Philippine Islands. Such order was based on the ground that he was an immigrant, not in possession of an unexpired immigration visa.

Petitioner contends that he is a legal resident of the United States and that defendant is acting in violation of the law in ordering his deportation. Petitioner has exhausted his administrative remedies and is now entitled to a consideration of his case

by means of the present petition for Writ of Habeas Corpus. *Trinler v. Carusi*, 166 F. 2d. 457.

In order to determine his status, it is necessary for the Court to review the recent history of the Philippine Islands. During the period that the United States exercised control of the Islands, children born there were entitled to the protection of the United States. Citizens of the Philippine Islands were not deemed to be aliens. *Gonzales v. Williams*, 192 U. S. 13. They owed allegiance to the United States. *Toyata v. United States*, 268, U. S. 402.

Under the legal status of his land of birth, petitioner was a national of the United States. He enjoyed such status at the time of his admission to Hawaii in 1931. Furthermore, it continued when he made his original entry into the continental United States in March of 1935. *Application of Vilorio*, 84 F. Supp. 584; *Cabebe v. Acheson*, 183 F. 2d 795.

Not until July 4, 1946, when the Philippine Islands achieved their independence did petitioner become an alien. Such change of status, however, did not deprive petitioner of his lawful residence in the Hawaiian Islands. As a permanent resident alien of Hawaii, petitioner was authorized to enter the United States without having in his possession an immigration visa. 8 USCA 213 (b). Moreover, petitioner, as a seaman, was entitled to the benefits of 8 C.F.R. 175.45(b) which reads as follows:

“Immigrants required to present passports but not permits to enter. Aliens who are lawful

permanent residents of the United States, and who fall within the following categories are exempt from the requirements of presenting permits to enter, inasmuch as the requirement thereof is waived, but must present passports:

(b) An alien, occupationally a seaman, who is returning in accordance with the terms of the articles of outward voyage, . . . ”

Since plaintiff has resided continuously in the United States and Hawaii since the time of his original admission for permanent residence in 1931 he is covered by the above quoted section of Title 8 of the Code of Federal Regulations. It should be noted that under the Immigration Act of 1924, Section 28(a), “The term ‘United States,’ when used in a geographical sense, means the States, the Territories of Alaska and Hawaii, . . . ” 8 USCA 224.

The single obstacle to petitioner’s admission raised by the Government is to be found in Section 8(a) (2) of the Act of March 24, 1934, whereby the basis for Philippine Independence was laid (48 Stat. 456). Such section reads in part as follows:

“Citizens of the Philippine Islands who are not citizens of the United States shall not be admitted to the continental United States from the Territory of Hawaii (whether entering such territory before or after the effective date of this section) . . . ”

From the enactment of this provision in the Philippine Independence Act, until 1946, when com-

plete independence was achieved by Presidential Proclamation (Proclamation 2695, July 4, 1946, 60 Stat. 1352, 11 F.R. 7517), petitioner was ineligible to enter the United States without a visa.

Commencing July 4, 1946, a petitioner's status was defined by Section 14 of the Philippine Independence Act which reads as follows:

"Upon final and complete withdrawal of American sovereignty over the Philippine Islands the immigration laws of the United States (including all provisions thereto relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries." 48 U.S.C.A. 1244.

In accordance with this section, the provisions of the Philippine Independence Act of 1934 were superseded by the immigration regulations applicable to all foreign countries. As a lawful resident alien of the Hawaiian Islands petitioner was eligible to enter the United States without a visa.¹ 48 USCA 1238. Any special restrictions placed on petitioner's movement between Hawaii and the continental United States were removed in 1946 and Section 8(a) (2) became ineffective.

The ruling of the Immigration and Naturalization Service in requiring such visa was erroneous as a matter of law and constituted a denial of due process

¹Persons in petitioners category have actually been admitted to citizenship in this Court. (Petition of Mary Almarza Bernal, #88505; Petition of Eusibio Aquino Hafalla, #84671; 8 USCA 703(a).

of law, contrary to the Fifth Amendment to the Constitution of the United States. *Kessler v. Strecker*, 307 U.S. 22. Petitioner is entitled to his release forthwith.

In view of the Court's conclusion that petitioner is eligible for admission into the United States without obtaining a visa, it becomes unnecessary to pass upon a second ground raised by petitioner as a basis for establishing his eligibility for admission. He contends that at the time of his entry into the continental United States on March 22, 1935, the Philippine Independence Act of March 24, 1934 (48 Stat. 456), had not yet become effective and therefore the language of Section 8(a) (2) of that Act did not cover his status. In passing, it should be noted that there are several interpretations as to the effective date of the Philippine Independence Act. These dates range from May 1, 1934 (Hackworth, Digest of International Law, Vol. 1, p. 496) through May 14, 1935 (*Del Guercio v. Cabot*, 161 F.2d 559 (9th Cir.), to November 15, 1935 (*Cabebe v. Acheson*, 183 F. 2d 795).

Petitioner shall prepare Findings of Fact and Conclusions of Law in accordance with the foregoing.

Dated June 15, 1951.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed June 15, 1951.

In the United States District Court for the
Northern District of California, Southern Division
No. 30281

LOPE M. VARLETA,

Plaintiff,

vs.

BRUCE G. BARBER, District Director, Immigra-
tion and Naturalization Service,
Defendant.

FINAL DECREE

This matter having come on to be heard before the undersigned judge of the above-entitled court, Joseph S. Hertogs appearing as attorney for the plaintiff above named, and Frank J. Hennessy, United States Attorney for the Northern District of California, and Edgar R. Bonsall, Assistant United States Attorney, appearing as attorneys for the defendant above named, and the Court having heard the evidence introduced by both parties, considered arguments, statements, and briefs of counsel, and having fully considered the matter, and the Court being fully advised in the premises, hereby makes the following:

Findings of Fact

1. That the petitioner is a native and citizen of the Philippine Islands.
2. That the petitioner was admitted to the Territory of Hawaii for permanent residence in 1931.

3. That at the time of petitioner's admission to the Territory of Hawaii for permanent residence in 1931 he was a national of the United States.

4. That the petitioner entered continental United States on March 22, 1935.

5. That the petitioner has resided continuously in the continental United States since March 22, 1935, except for periods of employment as a seaman on American owned vessels.

6. That the petitioner last returned to the United States from a foreign port as a seaman on an American vessel on November 22, 1947.

7. That the petitioner has been ordered deported to the Philippine Islands as an immigrant, not in possession of an unexpired immigration visa.

8. That the petitioner is presently detained by the Immigration and Naturalization Service.

9. That the petitioner has exhausted his administrative remedies.

10. That the petitioner ceased to be a national of the United States on July 4, 1946.

11. That Section 8(a) (2) of the Philippine Independence Act of 1934 became ineffective on July 4, 1946.

12. That commencing on July 4, 1946, petitioner's status under the immigration laws of the United States was defined by Section 14 of the Philippine Independence Act of 1934.

13. That the petitioner on November 22, 1947, was eligible to enter the United States without an unexpired immigration visa.

Conclusions of Law

1. That the petitioner is a lawful permanent resident of the United States.

2. That the decision of the Immigration and Naturalization Service, ordering the petitioner deported from the United States to the Philippine Islands, was erroneous and constitutes a denial of due process of law.

3. That the petitioner is illegally restrained of his liberty by the defendant.

Now Therefore, by reason of the foregoing Findings of Fact and Conclusions of Law, it is,

Ordered, Adjudged and Decreed, that the petitioner be discharged from custody by the respondent forthwith.

Dated this 19th day of June, 1951.

GEORGE B. HARRIS,

United States District Judge.

Approved as to form.

EDGAR R. BONSALE,

Assistant United States

Attorney.

[Endorsed]: Filed June 19, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given That

Bruce G. Barber, District Director of the United States Immigration and Naturalization Service, as defendant in the above action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Decree in the above-entitled case entered June 19, 1951, in the United States District Court of California, in the Northern District of the Southern Division and from the whole of said judgment and each and every part thereof on questions of law.

CHAUNCEY TRAMUTOLO,
United States Attorney.

By /s/ EDGAR R. BONSTALL,
Assistant U. S. Attorney.

[Endorsed]: Filed June 21, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
THE ACTION

The defendant herein having filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment made and entered herein June 20, 1951, now upon the

application of said defendant and appellant, appearing by Edgar R. Bonsall, Assistant United States Attorney for the Northern District of California, and Good Cause Appearing Therefor, it is hereby Ordered that said defendant and appellant have and hereby is given to and including September 18, 1951, for filing the record on appeal and docketing the action with said Appellate Court.

Dated August 29th, 1951.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed August 29, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
THE ACTION

The defendant herein having filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment made and entered herein June 20, 1951, now upon the application of said defendant and appellant, appearing by Edgar R. Bonsall, Assistant United States Attorney for the Northern District of California, and Good Cause Appearing Therefor, it is hereby Ordered that said defendant and appellant have and hereby is given to and including Septem-

ber 19, 1951, for filing the record on appeal and docketing the action with said Appellate Court.

Dated September 19th, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed September 19, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, to wit:

Designation of record on appeal and agreed statement of facts under Rule 76 of Title 28, USCA, Federal Rules of Civil Procedure;

Order extending time to file and docket record on appeal (filed September 19, 1951)

are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as stipulated by the attorneys for Appellant and Appellee.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 19th day of September, 1951.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. W. SMYTHE,
Deputy Clerk.

[Endorsed]: No. 13107. United States Court of Appeals for the Ninth Circuit. Bruce G. Barber, District Director Immigration and Naturalization Service, Appellant, vs. Lope M. Varleta, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 19, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,107

BRUCE G. BARBER, District Director, Immigration
and Naturalization Service,
Defendant-Appellant,

vs.

LOPE M. VARLETA,
Plaintiff-Appellee.

DESIGNATION OF RECORD ON APPEAL
AND STATEMENT OF POINTS

Pursuant to the provisions of Rule 19(6), Chauncey Tramutolo, United States Attorney for the Northern District of California, and Edgar R. Bonsall, Assistant United States Attorney, counsel for defendant-appellant, hereby adopt the designation of record on appeal and statement of points to be relied upon, as set forth in their statement filed with the United States District Court on September 18, 1951.

Dated September 24, 1951.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ EDGAR R. BONSALL,
Assistant United States Attorney, Counsel for Defendant-Appellant.

[Endorsed]: Filed September 24, 1951.

No. 13,107

IN THE

United States Court of Appeals

For the Ninth Circuit

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,

Appellant,

vs.

LOPE M. VARLETA,

Appellee.

BRIEF FOR APPELLANT.

CHAUNCEY TRAMUTOLO,

United States Attorney,

EDGAR R. BONSALE,

Assistant United States Attorney,

Post Office Building, San Francisco, California,

Attorneys for Appellant.

MORTON M. LEVINE,

ARLIN W. HARGREAVES,

Adjudication Section, Immigration and Naturalization Service,

Appraiser's Building, San Francisco, California,

On the Brief.

FILED

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No. 13,107

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,

Appellant,

vs.

LOPE M. VARLETA,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

Jurisdiction was invoked in the Court below by the filing of a Petition for Writ of Habeas Corpus alleging that the petitioner had been denied due process of law within the meaning of the Fifth Amendment of the Constitution and denied equal protection of the law within the meaning of the Fourteenth Amendment of the Constitution. Jurisdiction to review the decision below is conferred on this Court by 28 U.S.C. Paragraph 1291.

STATEMENT OF THE CASE.

The issues are clearly questions of law and not of fact. Therefore, the appellant and appellee have stipulated to the following facts:

Appellee was born at Pandan Antique, Philippine Islands, on September 25, 1914, and was admitted to the Hawaiian Islands for permanent residence in the year 1931, as a National of the United States. He arrived in the Continental United States March 22, 1935, and was excluded from admission to the United States on March 27, 1935, by a Board of Special Inquiry, as a stowaway. (39 Stat. 887, 8 U.S.C. 153.) Appellee was placed aboard a steamship for deportation to the Hawaiian Islands, but escaped from the vessel on April 6, 1935, and made his way into the Continental United States where he has resided since that date. The appellee has been physically present in the United States since April 6, 1935, except for his temporary absences in pursuit of his calling as a seaman aboard American vessels. The appellee last entered the United States from a foreign port on November 22, 1947, at Norfolk, Virginia, seeking admission as a resident alien seaman returning to the United States. On September 29, 1950, appellee was accorded a deportation hearing by a Hearing Examiner for the Immigration and Naturalization Service, and on November 29, 1950, a warrant for his deportation was issued charging that at the time of his last entry at Norfolk, Virginia, November 22, 1947, that the appellee was not in possession of a valid Immigration Visa and not exempted from the presentation thereof.

While in custody of the Immigration and Naturalization Service pending his deportation from the United States, appellee personally filed on January 9, 1951, a Petition for Writ of Habeas Corpus, and an Order to Show Cause was filed returnable on January 23, 1951. A continuance was granted and a Return to Order to Show Cause and a Memorandum of Points and Authorities were filed in the United States District Court, San Francisco, California, on February 6, 1951. Points and Authorities were also filed by counsel for appellee on that date, and on February 7, 1951, the matter was argued before the Honorable George B. Harris, United States District Judge in the United States District Court, San Francisco, California, and submitted.

The only questions of law to be determined in this matter were:

(1) Whether Section 8(a)(2) of the Philippine Independence Act of 1934, was nullified on July 4, 1946, by the operation of Section 14 of that Act, after Presidential Proclamation No. 2695 was signed by the President of the United States, surrendering sovereignty of the United States over the Philippine Islands;

(2) Was the effective date of the Philippine Independence Act May 1, 1934; and

(3) Was the plaintiff required by law to present an Immigration Visa upon the occasion of his return to the United States as a bona fide seaman, at Norfolk, Virginia, on November 22, 1947?

**STATEMENT OF POINTS TO BE RELIED UPON
ON APPEAL.**

(1) That the Court erred in finding that Section 8(a)(2) of the Philippine Independence Act of 1934 is no longer effective.

(2) The Court erred in finding that the plaintiff is a lawful permanent resident of the United States.

(3) That Court erred in finding that the deportation order of the Immigration and Naturalization Service, ordering the plaintiff's return to the Philippine Islands was erroneous.

ARGUMENT.

I.

NOTWITHSTANDING PRESIDENTIAL PROCLAMATION NO. 2695 DATED JULY 4, 1946, SECTION 8(a)(2) OF THE PHILIPPINE INDEPENDENCE ACT OF MARCH 24, 1934 IS STILL IN FULL FORCE AND EFFECT.

The Philippine Independence Act of March 24, 1934 (48 Stat. 456) contains the following provisions with reference to immigration of Filipinos to the United States:

“Sec. 8(a). Effective upon the acceptance of this Act by concurrent resolution of the Philippine Legislature or by a convention called for that purpose, as provided in section 17 * * *

(1) For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13(c)), this section, and all other laws of the United States relating to the immigration, ex-

clusion, or expulsion of aliens, *citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens*. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. This paragraph shall not apply to a person coming or seeking to come to the Territory of Hawaii who does not apply for and secure an immigration or passport visa, but such immigration shall be determined by the Department of the Interior on the basis of the needs of industries in the Territory of Hawaii.

(2) *Citizens of the Philippine Islands who are not citizens of the United States shall not be admitted to the Continental United States from the Territory of Hawaii (whether entering such Territory before or after the effective date of this section) unless they belong to a class declared to be nonimmigrants by section 3 of the Immigration Act of 1924 or to a class declared to be non-quota immigrants under the provisions of section 4 of such Act other than subdivision (c) thereof, or unless they were admitted to such Territory under an immigration visa. The Attorney General¹ shall by regulations provide a method for such exclusion and for the admission of such excepted classes.*

(3) Any Foreign Service Officer may be assigned to duty in the Philippine Islands, under a commission as a consular officer, for such period as may be necessary and under such regulations as the Secretary of State may proscribe

¹Secretary of Labor in the original function transferred to the Attorney General by Reorganization Plan No. V, 5 F.R. 2223.

during which assignment such officer shall be considered as stationed in a foreign country; but his powers and duties shall be confined to the performance of such of the official acts and notarial and other services, which such officer might properly perform in respect of the administration of the immigration laws if assigned to a foreign country as a consular officer, as may be authorized by the Secretary of State.

(4) For the purposes of section 18 and 20 of the Immigration Act of 1917, as amended, the Philippine Islands shall be considered to be a foreign country.

(b) The provisions of this section are in addition to the provisions of the immigration laws now in force, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws not inapplicable, shall apply to and be enforced in connection with the provisions of this section. An alien, although admissible under the provisions of this section, shall not be admitted to the United States if he is excluded by any provisions of the immigrations laws other than this section and an alien although admissible under the provisions of the immigration laws other than this section, shall not be admitted to the United States if he is excluded by any provisions of this section.

(c) Terms defined in the Immigration Act of 1924, shall, when used in this section, have the meaning assigned to such terms in that Act."

"Sec. 14. Upon the final and complete withdrawal of American sovereignty over the Phil-

ippine Islands the immigration laws of the United States (including all the provisions thereof relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries.” (Emphasis supplied.)

Up to the date of the acceptance of the Philippine Independence Act by the Philippine Legislature on May 1, 1934, Filipinos as nationals of the United States were allowed unrestricted immigration into the United States and its territories.

One of the features of that legislation which occasioned considerable comment during its progress was that which dealt with the immigration of citizens of the Philippine Islands to the United States. The Act was considered in a time of great economic depression and unemployment in Continental United States was widespread. American labor interests vigorously advocated protection from the unrestricted immigration of Filipino laborers. Inasmuch as Filipinos were at that time nationals of the United States, their migration to this country was not impeded by the immigration laws. Their competition with American workers was represented as a factor which contributed to the lowering of the American standard of wages and living.² Some representations were made, however, that conditions in the Hawaiian Islands were such that in at least some industries the only available source of labor consisted of Filipinos, and that it would be detrimental to the economic well-

²House Report No. 968, 73rd Congress, 2d Session, pp. 5-12-13.

being of these Islands to restrict the immigration of such laborers.³ There appeared to be no strenuous objection to continuing to permit the admission of Filipino laborers to Hawaii, but opposition was expressed to the further admission of citizens of the Philippines to the Continental United States, whether they were coming here from the Philippine Islands, Hawaii, or elsewhere.

A prior Act in the year 1933 was passed by the 72nd Congress of the United States over the veto of President Hoover, but was never adopted by the Philippine Legislature. The Congressional Record reflects that in discussing the prior Act, no critical comment was evoked concerning the restriction imposed by the bill upon the movement of citizens of the Philippines from Hawaii to Continental United States. In passing the Philippine Independence Act of March 24, 1934, Congress retained all of the immigration provisions adopted by the conferees for inclusion in the 1933 Act.

There has been no express repeal of Section 8(a)(2) of the Philippine Independence Act. Therefore, the question before this Honorable Court is whether Section 14 of the same Act has so effected Section 8 that its provisions are no longer applicable. It is a basic principle of law that repeals by implication are not favored, and that statutes should not be construed so as to work such a repeal, unless the intent of the legislation is clear and manifest. The

³Cong. Rec. Volume 76, Part I, p. 255.

United States Supreme Court in deciding the case of *United States v. Borden Company*, 308 U.S. 188, 198 (1949), stated as follows:

“It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. *United States v. Tynen*, 11 Wall. 88, 92; *Henderson’s Tobacco*, 11 Wall. 652, 657; *General Motors Acceptance Corp. v. United States*, 266 U.S. 49, 61, 62. The intention of the legislature to repeal ‘must be clear and manifest.’ *Red Rock v. Henry*, 106 U.S. 596, 601, 602. It is not sufficient, as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, ‘to establish that subsequent laws cover some or even all of the cases provided for by (the prior Act); for they may be merely affirmative, or cumulative, or auxiliary.’ There must be a ‘positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy.’ See, also *Posados v. National City Bank*, 296 U.S. 497, 504.”

As quoted supra, Section 14 of the Philippine Independence Act of March 24, 1934, provides that after independence immigration laws of the United States shall apply to persons who were born in the Philippine Islands “to the same extent”, as in the case of other foreign countries.

The purpose of the Immigration provisions of the Philippine Independence Act was to provide Filipino labor for the industries of the Hawaiian Islands and

at the same time to prevent such laborers or other Filipinos from entering Continental United States.

The appellee contends that by the operation of Section 14 of the Act, Section 8(a)(2) is now inoperative. To accept this contention would lead to the absurd result of Congress expressly restricting the coming of Filipinos to the mainland and in the same Act providing for their unrestricted admission to the Continental United States from Hawaii after the Philippine Islands had obtained their complete independence. Such interpretation is in direct violation of the expressed intent and purposes of the Philippine Independence Act which was in form, restrictive legislation.

The Court's attention is invited to the long established rule of law that in construing a statute, the intent and purpose of the act must be considered and further where there are general and special provisions covering the same subject, the special provisions will prevail. In the case of *Rogers v. United States*, 185 U.S. 83, the United States Supreme Court stated at page 87:

“It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not effect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to

be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.”

This same Court referred on page 89 to the opinion of Mr. Justice Christiancy speaking for the Supreme Court of the State of Michigan in the case of *Crane v. Reeder*, 22 Michigan 322, 344, and quoted from that case as follows:

“Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous as the legislature is not to be presumed to have intended a conflict.”

In the case of *McCaughn v. Hershey Chocolate Company*, 283 U.S. 389 at 492, the Court stated:

“Possible doubts as to the proper construction of the language used should be resolved in the light of its administrative and legislative history.”

See also *Posadas v. National City Bank*, 296 U.S. 497 at pp. 503-504.

The United States Court of Appeals for the Eighth Circuit in the case of *United States v. Windle*, 158 Fed. (2d) 196 at p. 199 stated:

“We recognize the rule that generally special terms of a statute prevail over general terms in the same or another statute which might otherwise control. *MacEvoy v. United States*, 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163; *Robinson v. United States*, 8 Cir. 142 Fed. 2d 431. But the purpose of this rule is to give effect to presumed intention of the law-making body. The primary rule of statutory construction requires us to ascertain and give effect to the legislative intention, *Flippin v. United States*, 8 Cir. 121 F. 2d 742; *United States v. Hartwell*, 73 U. S. 385, 18 L. Ed. 830 * * *

The United States Court of Appeals for the Fifth Circuit in the case of *Dealer's Transport Co. v. Reese*; *Clark v. Same*, 138 Fed. (2d) 638 at p. 640, stated:

“It is the duty of the court to reconcile asserted ambiguities, if possible, and to give effect to all parts of a statute so as to effectuate the intent and purpose of the Legislature.”

And in the case of *United States v. Mattio, et al.*, 17 Fed. 879, this Honorable Court held that where there is an inconsistency between general and specific provisions of an Act, the specific provisions control.

The Government contends that when Congress said that the immigration laws were to apply “to the same extent”, it meant that the Filipinos would no longer be in a “favored class”, but would be considered as aliens. It meant among other things, that the quota for the Philippines, instead of fifty annually was to be determined as in the case of other foreign countries; that the privilege of importing laborers to

Hawaii without regard to the immigration laws was to cease; and that the Philippine Islands were to be a foreign country for all purposes under the immigration laws and not merely for the purposes set forth in Sections 8(a)(3) and 8(a)(4) of the Independence Act.

These were the ways in which during the transition period the immigration laws would *not* apply to Filipinos “to the same extent” as to other aliens, insofar as immigration to the territory of the United States was concerned. There is nothing inconsistent between Section 8(a)(2) and Section 14 insofar as they are applicable to citizens of the Philippines who wish to come to the United States from *foreign territory* after July 4, 1946. Such persons as aliens must be in possession of appropriate immigration or passport visas and once having entered Hawaii with such documents, Section 8(a)(2) does not preclude their further journey to the continent. As to such persons therefore, the immigration laws are applicable “to the same extent” as to other aliens. The same recognition was also afforded to those Filipinos who arrived in Hawaii in possession of immigration visas *prior* to July 4, 1946. It is only those citizens of the Philippines *who were restricted to the territory of Hawaii prior to July 4, 1946* whose further movement is restricted by Section 8(a)(2). *Their movement is not more restricted now than it was when they were actually nationals of the United States.*

In view of the history and obvious purposes of the immigration provisions of the Philippine Independ-

ence Act, it is the government's contention that Sections 8(a)(2) and 14 of the Act should be read together and their terms construed in such manner as would most nearly conform to the desires and intent of the legislature and at the same time follow the rules of statutory interpretation. Thus, it follows that the only conclusion that can be reached is that Section 8(a)(2) is a special provision controlling the general provision Section 14 and is therefore still in full force and effect.

II.

APPELLEE DOES NOT HAVE A LEGAL RESIDENCE IN THE UNITED STATES.

Appellee Varleta does not have a legal residence in Continental United States and the Court below erred in its assumption that appellee was a lawful resident alien of the Hawaiian Islands. (Tr. 10.)

The question as to the effective date of the Philippine Independence Act was raised in the Court below. That Court in its written opinion found it unnecessary to pass upon this question. However, the government contends that in determining the legality of the residence of appellee, the question of the effective date must be considered.

Section 8(a) of the Philippine Independence Act (Tydings-McDuffie Act) reads:

“Effective upon the acceptance of this Act by concurrent resolution of the Philippine legis-

*lature or by a convention called for that purpose as provided in Section 17 * * **” (Emphasis supplied.)

Section 17 reads:

“The foregoing provisions of this Act shall not take effect until accepted by concurrent resolution of the Philippine Legislature or by a convention called for the purpose of passing upon that question as may be provided by the Philippine Legislature. (48 Stat. 456-457, 462, 465; 48 U.S.C. 1232, 1240, 1244, 1247.)”

The Act became effective on May 1, 1934, when a concurrent resolution accepting the provisions of the Act was adopted by the Senate and the House of Representatives of the Philippine Legislature in joint session. (Hackworth Digest of International Law, Volume 1, p. 486.)

This contention is further borne out in Presidential Proclamation No. 2696, July 8, 1946, 11 F.R. 7517, 60 Stat. 1353 reading in part:

“The immigration quota * * * authorized by Section 8(a)(1) of the Act approved March 24, 1934, entitled ‘An Act to Provide for the Complete Independence of the Philippine Islands’ * * * *which Act was accepted by concurrent resolution of the Philippine Legislature on May 1, 1934 and which became effective on that date* * * *” (Emphasis supplied.)

The question of the effective date of the Philippine Independence Act of March 24, 1934, was raised before the Honorable Court in the case of *Cabebe v.*

Acheson, 183 Fed. (2d) 795 (June 23, 1950) at which time it was stated at page 799:

“By its terms the Act was not effective until accepted by concurrent resolution of the Philippine Legislature or by a convention called for the purpose of passing upon such question * * * As of the date of such acceptance (which occurred in fact on May 1, 1934), it was provided in Section 8(a)(1) of the Act that ‘(f)or the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (with an exception not pertinent here) * * *.’”

Appellee in his Points and Authorities filed in the Court below cited the case of *Del Guercio v. Gabot*, 161 F. (2d) 559 (1949) at page 560 in support of his contention that the effective date of the Philippine Independence Act was subsequent to May 1, 1934.

This Honorable Court's attention is invited to page 560 of the referred to case, and it will be noted that the Court refers to the acceptance of the *new Philippine Constitution* by the Philippine people, rather than the acceptance of the immigration provisions contained in the Philippine Independence Act which provided for their acceptance by concurrent resolution of the Philippine Legislature. (Section 1238, 1247, Title 48 U.S.C.A.)

Appellee, in the Court below also cited the cases of *Bradford v. Chase National Bank of City of New York*, 24 Fed. Supp. 28, 37, affirmed 105 F. (2d) 1001, affirmed 60 S. Ct. 707, 84 L. Ed. 990 and *Cincinnati Soap Co. v. United States*, 81 L. Ed. 1122, 1131,

301 U.S. 308, 319 in support of his contention that the Federal Courts have differed greatly in fixing the effective date of the Philippine Independence Act. Attention of this Honorable Court is again invited to these cases and it will note that they also refer to the acceptance of the Philippine Constitution and not to the adoption of the immigration provisions of the Philippine Independence Act.

Section 4 of the Philippine Independence Act of March 24, 1934 (48 Stat. 456) reads in part:

“Submission of Constitution to Filipino People.

Sec. 4. After the President of the United States has certified that the Constitution conforms with the provisions of this Act, it shall be submitted to the people of the Philippine Islands for their ratification or rejection * * * on a date to be fixed by the Philippine Legislature, at which election the qualified voters * * * shall have an opportunity to vote directly for or against the proposed Constitution * * *”

However, with regard to the immigration provisions, that same statute reads, in section 8:

“Effective upon the acceptance of this Act by concurrent resolution of the Philippine Legislature * * *”

Thus, it may be seen that while the effective date of the Philippine Constitution would be after submission to and ratification by the people, the effective date of Section 8 containing the immigration provisions, was to be upon the acceptance of the Act by

concurrent resolution of the Philippine Legislature. As stated *supra*, said Act was adopted by concurrent resolution of the Philippine Legislature on May 1, 1934.

It has been stipulated that prior to March 24, 1934, appellee was a national of the United States, and that his entry as a stowaway in the Hawaiian Islands in the year, 1931, was considered a lawful entry. However, as stated in its opinion (Tr. at pages 9 and 10) the Court below held that from the enactment of the Philippine Independence Act, appellee was ineligible to enter the United States without a visa.

Appellee attempted to enter the United States on March 22, 1935, after having stowed-away aboard the S.S. "Hanover". He was excluded from admission to the United States on March 27, 1935, as a stowaway by a regularly convened Board of Special Inquiry. (39 Stat. 887, 8 U.S.C. 153.) Notwithstanding said exclusion, appellee on April 6, 1935, escaped from the S.S. "Lurline" on which he had been placed for deportation to the Hawaiian Islands, and entered the Continental United States.

It is evident that appellee first stowed away on the S.S. "Hanover" for the purpose of coming to the United States. His subsequent illegal entry into the Continental United States and failure to return to Hawaii is conclusive evidence that appellee intended to remain in Continental United States, and to abandon his legal domicile in the Hawaiian Islands.

It is well settled that a legal resident may depart from Hawaii for a temporary visit and subsequently return without loss of status. However, it is equally well settled that if a resident alien departed from his legal residence without an intent to return, he abandons such legal status. The question of intent is discussed in the case of *United States ex rel. Alther et al. v. McCandless*, 46 F. (2d) 288 at p. 290 as follows:

“In *United States ex rel. Lesto v. Day*, 21 Fed. (2d) 307, 308, the Circuit Court of Appeals for the Second Circuit said: ‘Without attempting a complete definition of a “temporary visit,” we may say that we think the intention of the departing immigrant must be to return within a period relatively short, fixed by some early event.’ It will be noted that under this rule, the animus revertendi must exist as a positive element. A mere absence of intention to remain abroad permanently will not preserve the alien’s nonquota status. The burden of proof is still with the government and must be met by the production of substantial evidence, *but if it appear that he left with no definite intention, either of staying permanently or of returning, merely planning to let future events determine his course, his stay would not be a temporary visit and the statute would automatically place him in the quota class.*” (Emphasis supplied.)

From the facts in the case at bar, it cannot be said that appellee has continued to maintain a lawful residence in the Islands of Hawaii. However, even if we were to concede that he maintained a residence in Hawaii from and after May 1, 1934, he was not

eligible to come to the Continental United States and could acquire no lawful residence therein.

Specifically referring to Section 8(a)(1) and 8(a)(2), which have been quoted in their entirety, supra, pertinent portions of those sections are again quoted:

8(a)(1):

“For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 * * * citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens.”

8(a)(2):

“Citizens of the Philippine Islands * * * shall not be admitted to the Continental United States from the territory of Hawaii * * * unless they belong to a class declared to be nonimmigrants by Section 3 of the Immigration Act of 1924, or to a class declared to be nonquota immigrants, under the provisions of Section 4 of such Act * * *”

Section 1 of the Immigration Act of February 5, 1917 (39 Stat. 874, 8 U.S.C. 173), reads in part:

“ * * but if any alien shall leave the Canal Zone, or any insular possession of the United States, and attempt to enter any other place under the jurisdiction of the United States, nothing contained in this Act shall be construed as permitting him to enter under any other conditions than those applicable to all aliens.”* (Emphasis supplied.)

Section 3 of the Immigration Act of February 5, 1917, reads in part:

“That the following classes of aliens shall be excluded from admission into the United States
* * * stowaways * * *.”

Section 3 of the Immigration Act of 1924 (43 Stat. 154, 47 Stat. 607, 54 Stat. 711, Section 7(c), 59 Stat. 672; 8 U.S.C. 203) enumerates aliens who may be classified as nonimmigrants. Section 4 of that same Act (43 Stat. 155, 44 Stat. 812, 45 Stat. 1009, 46 Stat. 854, 47 Stat. 656, 8 U.S.C. 204) classifies those aliens considered to be nonquota immigrants.

III.

APPELLEE IS ILLEGALLY WITHIN THE UNITED STATES AND IS DEPORTABLE TO THE PHILIPPINE ISLANDS.

From the facts in the case at bar, it is apparent that the appellee at time of his entry in 1935, was excludable under the provisions of the Immigration Act of 1917 and did not fall within any of the categories enumerated in Sections 3 and 4 of the Immigration Act of 1924. He was, therefore, properly excluded by the aforesaid Board of Special Inquiry on March 27, 1935. Further, at the time of his surreptitious entry into Continental United States on April 6, 1935, he was not in possession of a visa which would have placed him in a class declared to be a nonquota immigrant under Section 4 of the Immigration Act of 1924, and he would, therefore be

deportable as an alien who at the time of his entry in 1935 was not in possession of an immigration visa.

While appellee had remained in the United States from April 6, 1935, to some date in 1945, at which time he took up the pursuit of a seaman, it cannot be said, as indicated above, that appellee ever had a legal permanent residence in Continental United States. The legality of an alien's entry into the United States can never be based on a former illegal entry. *Del Castillo v. Carr*, C.C.A. Cal. 1938, 100 F. (2d) 338. In the absence of facts showing that the departure of an alien from the United States was not voluntary, every entry into the United States by an alien from a foreign port constitutes a new entry into the United States within the intent and meaning of the immigration laws.

Delgadillo v. Carmichael, 332 U.S. 388, 68 S. Ct. 10;

Carmichael v. Delaney, 170 F. (2d) 239;

United States ex rel. Clausen v. Day, 279 U.S. 398.

Thus, at the time of appellee's last entry into the United States from a foreign port at Norfolk, Virginia, on November 22, 1947, he was at that time attempting to return to a claimed residence and as such should have been in possession of the proper immigration documents as required under Section 4 of the Immigration Act of 1924. Having no legal residence in the United States, he was ineligible for the benefits of the regulation contained in 8 C.F.R.

175.45(b)⁴ and his entry from “a place outside the United States” in 1947 *was* in violation of the aforesaid Immigration Act of 1924. Therefore, the charge contained in the Immigration warrant of arrest that the appellee was not in possession of a valid immigration visa is substantiated as is the warrant of deportation ordering appellee’s deportation to the Philippine Islands, dated November 29, 1950.

The Court below in its opinion (Footnote T.R. 10) stated that persons in appellee’s category have actually been admitted to citizenship in the District Court. However, it is desired to emphasize that in the cases of those persons, there was a record of their entry into the Continental United States pursuant to the provisions of Section 8(a)(2) of the Philippine Independence Act. In addition, the Court’s attention is invited to the fact that the statutes covering naturalization are separate and apart from those statutes regulating immigration. This difference was recognized by the Court in *Application of Vilorio*, 84 F. Supp. 587:

⁴Section 174.45 Code of Federal Regulations:

IMMIGRANTS REQUIRED TO PRESENT PASSPORTS
BUT NOT PERMITS TO ENTER.

Aliens who are lawful permanent residents of the United States, and who fall within the following categories are exempt from the requirements of presenting permits to enter, inasmuch as the requirement thereof is waived, but must present passports;

(a) * * *

(b) An alien, occupationally a seaman, who is returning in accordance with the terms of the articles of outward voyage, or the terms of his discharge before a consular officer of the United States.

“In dealing with naturalization matters, differing greatly from immigration * * *”

In any event, the question of what rights appellee may have under naturalization laws are not before the Court in this action.

CONCLUSION.

It is respectfully submitted, therefore, that the order of the Court below be reversed and that appellee be remanded to the custody of the Immigration and Naturalization Service.

Dated, San Francisco, California,
November 19, 1951.

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No. 13,107

IN THE

United States Court of Appeals
For the Ninth Circuit

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,

Appellant,

vs.

LOPE M. VARLETA,

Appellee.

BRIEF FOR APPELLEE.

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FILED

DEC 20 1951

PAUL P. O'BRIEN
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No. 13,107

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,

Appellant,

vs.

LOPE M. VARLETA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The plaintiff-appellee filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of California, alleging that the petitioner had been denied due process of law within the meaning of the Fifth Amendment to the Constitution of the United States and denied equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States. Jurisdiction of the District Court to entertain the Petition for a Writ of Habeas Corpus is conferred by 28 U.S.C., Sections 451, 452 and 453.

The writ was granted by District Judge George B. Harris (T. 7 et seq.) and the defendant appealed (T. 15).

Jurisdiction of this Court to review the District Court's final decree granting a writ of habeas corpus is conferred by 28 U.S.C., Section 463.

STATEMENT OF THE CASE.

In accordance with the provisions of Rule 76, Federal Rules of Civil Procedure, Title 28, U.S.C.A., the appellant and appellee have stipulated to an agreed statement of the facts. That stipulation reads as follows:

"It is hereby stipulated and agreed between the parties hereto, by their respective attorneys duly authorized, that the pertinent facts on appeal are as follows, and that this matter may be submitted to the United States Court of Appeals for the Ninth Circuit under Rule 76 of the Federal Rules of Civil Procedure, and that this statement shall constitute the designated record on appeal and the points to be relied upon:

Plaintiff was born at Pandan Antique, Philippine Islands, on September 25, 1914, and was admitted to the Hawaiian Islands for permanent residence in the year 1931 as a National of the United States. He arrived in the Continental United States March 22, 1935 and was excluded from admission to the United States on March 27, 1935 by a Board of Special Inquiry, as a stowaway (39 Stat. 887, 8 USC 153). Plaintiff was placed

aboard a steamship for deportation to the Hawaiian Islands but escaped from the vessel on April 6, 1935, and made his way into the Continental United States where he has resided since that date. The plaintiff has been physically present in the United States since April 6, 1935 except for his temporary absences in pursuit of his calling as a seaman aboard American vessels. The plaintiff last entered the United States from a foreign port on November 22, 1947 at Norfolk, Virginia, seeking admission as a resident alien seaman returning to the United States. On September 29, 1950, plaintiff was accorded a deportation hearing by a Hearing Examiner for the Immigration and Naturalization Service, and on November 29, 1950, a warrant for his deportation was issued charging that at the time of his last entry at Norfolk, Virginia, November 22, 1947, that the plaintiff was not in possession of a valid Immigration Visa and was not exempted from the presentation thereof.

While in custody of the Immigration and Naturalization Service pending his deportation from the United States, plaintiff personally filed on January 9, 1951, a Petition for Writ of Habeas Corpus, and an Order to Show Cause was filed returnable on January 3, 1951. A continuance was granted and a Return to Order to Show Cause and a Memorandum of Points and Authorities were filed in the United States District Court, San Francisco, California on February 6, 1951. Points and Authorities were also filed by Counsel for plaintiff on that date, and on February 7, 1951, the matter was argued before the Honorable George B. Harris, United States District Court

Judge in the United States District Court, San Francisco, California, and submitted.”

CONTENTIONS OF THE APPELLANT.

The Appellant contends that the decision of the District Court is in error for the following reasons:

(1) That the Court erred in finding that Section 8(a)(2) of the Philippine Independence Act of 1934 is no longer effective.

(2) The Court erred in finding that the plaintiff is a lawful permanent resident of the United States.

(3) The Court erred in finding that the deportation order of the Immigration and Naturalization Service, ordering the plaintiff's return to the Philippine Islands was erroneous.

ARGUMENT.

I.

THE PROVISIONS OF THE PHILIPPINE INDEPENDENCE ACT OF 1934 BECAME OBSOLETE BY PRESIDENTIAL PROCLAMATION NO. 2695 ON JULY 4, 1946.

By the Treaty of Paris, December 10, 1898, 30 Stat. 1754, the archipelago known as the Philippine Islands was ceded to the United States. Provisions of this treaty (Article IX) provided that the then Spanish subjects who were residing in the Islands could make an election of citizenship and that the “civil rights and political status of the native inhabitants of the

territories ceded to the United States shall be determined by the Congress.”

By Section 4 of the Act of July 1, 1902, 32 Stat. 692, it was provided that children born subsequent thereto shall be deemed citizens of the Philippine Islands and as such entitled to the protection of the United States. The Act of March 23, 1912, 37 Stat. 77, amended this section by adding thereto the proviso: “That the Philippine Legislature is hereby authorized to provide by law for the acquisition of Philippine citizenship by those natives of the Philippine Islands who do not come within the foregoing provisions * * *.”

The foregoing section was reenacted without substantial change as Section 2 of the Act of August 29, 1916, 39 Stat. 546, 48 U.S.C.A. 1002. Under the authority granted it the Philippine Legislature, on March 26, 1920, enacted what is known as the Philippine Naturalization Law.

This petitioner was born in the Philippine Islands on September 25, 1914. By reason of such birth and the provisions of the Statutes then in effect, the appellee acquired Philippine citizenship at birth. Also, as a result of his birth in the Philippine Islands at that time, the appellee became a national of the United States.

The Nationality Act of 1940 defines the phrase “national of the United States” as meaning “(1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes per-

manent allegiance to the United States. It does not include an alien." 8 U.S.C.A. 501(b).

The Supreme Court of the Philippines has held that birth in the Philippine Islands since the date of their annexation to the United States conferred Philippine citizenship. *Haw v. Collector of Customs*, No. 40,895, Official Gazette, Vol. 32, No. 68, p. 1310, and *Go Julian v. Government of the Philippine Islands*, 45 Phil. 289.

Citizens of the Philippine Islands are not aliens. *Gonzales v. Williams*, 192 U.S. 13, 24 S. Ct. 177, 48 L. Ed. 317. They owe no allegiance to a foreign government, but do owe allegiance to the United States. *Toyota v. United States*, 69 L. Ed. 1016, 268 U.S. 402, 45 S. Ct. 563.

The order of the Commissioner, Immigration and Naturalization Service, states the appellee "is a native and citizen of the Commonwealth of the Philippines." It is undisputed. However, at the time of his admission to Hawaii in 1931, he was a national of the United States. He still had this status upon his entry into the continental United States in March of 1935. *Application of Vilorio*, 84 F. Supp. 584, 585; *Cabebe v. Acheson*, 183 F. (2d) 795.

The Philippine Independence Act, which was approved on March 24, 1934, 48 Stat. 456, contains the following provisions with reference to the status of citizens of the Philippine Islands:

"Section 2(a). The constitution formulated and drafted shall * * * contain provisions to the effect that, pending the final and complete with-

drawal of the sovereignty of the United States over the Philippine Islands * * *

(1) All citizens of the Philippine Islands shall owe allegiance to the United States.”

The Constitution of the Philippines, adopted February 8, 1935, and approved by the President of the United States by Proclamation on March 23, 1935, provided in an Ordinance annexed thereto, as follows:

“Section 1. Notwithstanding the provisions of the foregoing Constitution, pending the final and complete withdrawal of the sovereignty of the United States over the Philippines—(1) All citizens of the Philippines shall owe allegiance to the United States.” 30 Philippine Public Laws, p. 386.

Generally speaking, nationals of the United States who are not citizens may enter other American territory without regard to the immigration laws. A citizen of the Philippine Islands who was admitted to the United States, including Hawaii, prior to the effective date of the Philippine Independence Act, was admitted for permanent residence. *Board of Immigration Appeals*, files 56040/990, September 26, 1940 and 56068/25, January 6, 1941.

It has been stipulated that the appellee is a lawful resident-alien of the Hawaiian Islands by reason of his admission to that Territory prior to the Philippine Independence Act of 1934. The appellee has resided continuously in the continental United States and the Territory of Hawaii since the time of his original admission for permanent residence in 1931. His only

absences have been as a seaman (1936 to 1947) in pursuit of his calling attached to American-owned vessels.

The Philippine Independence Act provided in part that:

“Governmental Relations, Immigration, Continuation of Privileges. Sec. 8(a). Effective upon the acceptance of this Act by concurrent resolution of the Philippine Legislature or by a convention called for that purpose, as provided in section 17—

“(1) For the purpose of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13(c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens.
* * *

“(2) Citizens of the Philippine Islands who are not citizens of the United States shall not be admitted to the continental United States from the Territory of Hawaii (whether entering such territory before or after the effective date of this section) unless they belong to a class declared to be nonimmigrants by section 3 of the Immigration Act of 1924 or to a class declared to be nonquota immigrants under the provisions of section 4 of such Act other than subdivision (c) thereof, or unless they were admitted to such territory under an immigration visa. * * *

“(3) Any foreign Service Officer may be assigned to duty in the Philippine Islands, under a commission as a consular officer, * * *

“(4) For the purposes of sections 18 and 20 of the Immigration Act of 1917, as amended, the Philippine Islands shall be considered to be a foreign country.

“(b) The provisions of this section are in addition to the provisions of the immigration laws in force, and shall be enforced as part of such laws, and all of the penal or other provisions of such laws not inapplicable, shall apply to and be enforced in connection with the provisions of this section. An alien, although admissible under the provisions of this Section, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this section, and an alien, although admissible under the provisions of the immigration laws other than this section, shall not be admitted to the United States if he is excluded by any provisions of this section.

(c) Terms defined in the Immigration Act of 1924 shall, when used in this section, have the meaning assigned to such terms in that Act.”
48 U.S.C.A. 1238.

“Immigration After Independence. Section 14. Upon final and complete withdrawal of American sovereignty over the Philippine Islands the immigration laws of the United States (including all provisions thereto relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries.”
48 U.S.C.A. 1244.

The President of the United States, by Proclamation 2695, dated July 4, 1946, 60 Stat. 1352, 11 F.R. 7517, proclaimed:

“The United States of America hereby withdraws and surrenders all right of possession, supervision, jurisdiction, control, or sovereignty now existing and exercised by the United States of America in and over the territory and people of the Philippines; and

“On behalf of the United States of America, I do hereby recognize the independence of the Philippines as a separate and self-governing nation and acknowledge the authority and control over the same of the government instituted by the people thereof, under the constitution now in force.”

The provisions of Section 8 of the 1934 Act regulated the immigration of these persons to the United States from foreign countries until July 4, 1946, when the Philippine Islands became an independent nation. At that time Section 14 of the same Act became effective. That section provides that after independence, the immigration laws of the United States shall apply to persons of this category *to the same extent as in the case of citizens of other foreign countries*.

Between the effective date of the Philippine Independence Act and July 4, 1946, Philippine citizens who had been admitted only to Hawaii were subject to the provisions of 8(a)(2) of the Act of 1934.

The query is, What is their status subsequent to July 4, 1946?

We are here concerned with the meaning of that part of Section 14 which says that, after independence, the immigration laws of the United States shall apply to persons born in the Philippine Islands "to the same extent as in the case of other foreign countries." A reasonable construction to place on this phrase is that after July 4, 1946, any person born in the Philippine Islands, regardless of his whereabouts, has the same status as any other alien. To arrive at any other construction would result in ambiguity.

Aliens arriving from foreign countries, including Filipinos, are today admitted at Hawaii to the United States for permanent residence. 8 C.F.R. 116. To arrive at a different determination would mean that those Philippine citizens who were admitted to Hawaii prior to July 4, 1946, are to be singled out and their movements restricted by an act which is now obsolete. See 48 U.S.C.A. 1238.

Any alien when effecting intra-insular travel or travel to the continental United States is exempt from exclusion on documentary grounds. A resident of an insular possession, such as Hawaii, can travel freely to the United States without obtaining any visa as required by the 1924 Act.

The Immigration and Naturalization Service admits that subparagraphs (1), (3) and (4) of Section 8 became ineffective on July 4, 1946. There is no basis for determining that subparagraph (2) remained in

full force and effect subsequent to the transition period. It is contended that Section 14 vitiated the Act in its entirety upon fulfillment of the conditions prescribed therein.

The Philippine Independence Act declared that upon final and complete withdrawal of American sovereignty over the Philippine Islands that the provisions of that Act which related to immigration would become obsolete and that the immigration laws then existing would apply "to the same extent as in the case of other foreign countries." The restrictions imposed by the Independence Act limited the migration of United States nationals, who are not subject to our immigration laws, during the transition period. In other words, as a price of eventual liberty, United States nationals of Philippine ancestry, were by this specific legislation, to be considered as aliens during the transition period for immigration purposes. Naturally, upon the complete and final withdrawal of American sovereignty the Philippine Islands became a separate and distinct nation. The citizens of that nation were to be granted the benefits of our laws to the same extent as in the case of citizens of any other foreign country.

It is interesting to note that Part 172, Title 8, Code of Federal Regulations, which dealt with the immigration, exclusion, and deportation of certain Filipinos of this category, was revoked in its entirety, effective July 4, 1946. 11 F.R. 7127.

Prior to July 2, 1946, Filipinos (except for a small class that does not have to be discussed here) were

not eligible for naturalization as citizens of the United States. The Act of July 2, 1946 provided that: "The right to become a naturalized citizen under the provisions of this Act shall extend only to * * * Filipino persons or persons of Filipino descent," 8 U.S.C.A. 703(a), and "Certificates of arrival or declaration of intention shall not be required of Filipino persons or persons of Filipino descent who are citizens of the Commonwealth of the Philippines on the date of the enactment of this section, and who entered the United States prior to May 1, 1934, and have since continuously resided in the United States."

Section 101(d) of the Nationality Act of 1940, 8 U.S.C.A. 501, defined the term "United States" as the "Continental United States, Alaska, Hawaii, * * *."

It must be assumed that the appellee, if otherwise qualified, is eligible for naturalization. *Cabebe v. Acheson, supra*. District Courts have admitted to United States citizenship Philippine citizens who were admitted to Hawaii prior to May 1, 1934, and who have arrived in the United States subsequent to that date without being in possession of a valid immigration visa.

Stated in another way, Filipinos whose cases were, so far as dates of entry into Hawaii and the United States are concerned, on all fours with that of the petitioner, have been admitted to United States citizenship in the District Court. This fact is incongruous

with the appellant's position that this petitioner must under his interpretation of the law be deported to the Republic of the Philippines.

Petition of Mary Almarza Bernal, No. 245-P-88505;

Petition of Eusibio Aquino Hafalla, No. 245-P-84671.

The Immigration and Naturalization Service in both of these cases presented the facts to the court with a favorable recommendation that citizenship be granted. If a person has an admission to the United States which is valid for naturalization, which is a privilege and not a right, he must also have a valid admission to the United States for immigration purposes.

Where the language of a statute is plain and unambiguous, there is no occasion for construction even though other meanings may be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the minds of the legislature, but the statute must be given effect according to its plain and obvious meaning.

U. S. v. Missouri Pac. Ry. Co., 49 S. Ct. 133, 278 U.S. 269;

Commissioner of Immigration v. Gottlieb, 265 U.S. 310, 44 S. Ct. 258;

U. S. v. Standard Brewery, 40 S. Ct. 139, 251 U.S. 210;

Lake County v. Rollins, 9 S. Ct. 651, 130 U.S. 662;

59 C.J. 593.

The cases relied upon by the appellant are not applicable to this case. In the first place, there was no repeal of Section 8(a)(2) by implication. The appellant conceded that the language of Section 14 of the same Act was sufficiently clear to effect a repeal of Sections 8(a)(1), 8(a)(3) and 8(a)(4). It is difficult to see how the appellant distinguishes the effect of Section 14 upon one subparagraph from the rest of the Act, and in particular one subparagraph from another subparagraph of the same section. It certainly is a well recognized canon of statutory construction that subsequent legislation will not effect a repeal of a prior enactment unless such repeal has been expressly provided. However, in this instance, we are not confronted with two separate and distinct Acts which are irreconcilable and subject to judicial construction. In this particular case, we are dealing with two sections of the same Act, and naturally, as part of the same Act, each is entitled to equal weight and should be interpreted to make them consistent and harmonious if at all possible.

The language used in Section 14 of the Philippine Independence Act is clear and unambiguous. Upon a final withdrawal of American sovereignty over the Philippine Islands, the citizens of the Philippine Islands who had been previously nationals of the United States were to be extended the same benefits under the immigration laws as that applicable to citizens of other nations. In accordance with the provisions of Section 14, Section 8(a)(2) was superseded by the general immigration statutes and re-

strictions on the appellee's residence were removed when Section 8(a)(2) became ineffective, and his status is to be determined from the law applicable to other aliens.

II.

EFFECTIVE DATE OF THE PHILIPPINE IMMIGRATION ACT OF 1934.

The appellee agrees with the District Court's conclusion that the effective date of the Philippine Independence Act is immaterial in determining this appellee's present status. However, in view of the appellant's discussion of this matter, a short argument showing the inconsistencies of prior judicial interpretations follows:

The Philippine Immigration Act was approved on March 24, 1934. The Constitution of the Philippines was adopted on February 8, 1935, and approved by the President of the United States by Proclamation on March 23, 1935. Proclamation No. 2148 dated November 14, 1935, 49 Stat. 3481, announced the result of election of officers in the Philippines and proclaimed termination of the then existing government.

The Court of Appeals for the Ninth Circuit stated in the case of *Del Guercio v. Gabot*, 161 F. (2d) 559, at page 560:

"The Independence Act (48 U.S.C.A. 1231), although it became a law of the United States in March 1934 was by its terms not to be effective

until the Philippine people accepted it. Formal acceptance became effective May 14, 1935."

The same court expressed a different view in the case of *Cabebe v. Acheson*, 183 F. (2d) 795, at page 799:

"As of the date of acceptance (which occurred in fact on May 1, 1934), it was provided in Section 8(a)(1) of the Act * * *."

November 15, 1935, the date of Proclamation 2148, supra, has been held to be the effective date of the Act of March 24, 1934. The court stated:

"The Secretary of War is the officer who now deals with the affairs of the Philippine Commonwealth so far as the United States is concerned therewith, and, prior to the effective date of the Independence Act, November 15, 1935, his predecessors were in charge of affairs of the Philippine Government for upwards of a generation." *Bradford v. Chase Nat. Bank of City of New York*, 24 F. Supp. 28, 37, affirmed 105 F. 2d 1001, affirmed 60 S. Ct. 707, 84 L. Ed. 990.

The Department of State and the Immigration and Naturalization Service have consistently held that the effective date of said Act is May 1, 1934. *Hackworth, Digest of International Law*, Vol. 1, p. 496.

The Constitution of the Philippines, adopted February 8, 1935, and approved by the President of the United States by proclamation on March 23, 1935, has been referred to as the effective date of the Philippine Independence Act. See *Cincinnati Soap Co. v. United States*, 81 L. Ed. 1122, 1131, 301 U.S. 308, 319.

The Philippine Independence Act of 1934 further declared that on July 4th next following the expiration of a period of ten years from the date of the inauguration of the new government under such constitution, the President of the United States would proclaim the complete independence of the Philippine Islands and the people thereof.

Section 3 of the Act of June 29, 1944, ch. 322, 58 Stat. 625, provided in part that the date of independence could be advanced prior to July 4, 1946, but this was not done.

It should be noted that Congress and the President of the United States both recognized that the ten-year period specified in the Act of 1934 elapsed on *July 4, 1946*.

III.

THE APPELLEE IS A PERMANENT RESIDENT OF THE UNITED STATES NOT DEPORTABLE ON THE CHARGES CONTAINED IN THE APPELLANT'S WARRANT OF DEPORTATION.

The appellee enjoyed the status of a national of the United States until July 4, 1946. Not until that date, when the Philippine Islands were granted their independence, did the appellee become an alien.

The change of such status, however, did not deprive the appellee of his lawful residence in the Hawaiian Islands. As a permanent resident-alien of Hawaii, which the appellant concedes, on and after July 4, 1946 the appellee was authorized to enter the United

States without having in his possession an immigration visa.

The Hawaiian Islands became a possession and organized territory of the United States by annexation under the provisions of a joint resolution adopted by the Congress of the United States on July 7, 1898 (48 U.S.C. 499). Section 3 of the Immigration Act of 1924, 8 U.S.C.A. 203, defines an immigrant as "any alien departing from any place outside the United States destined for the United States." Section 28(a) of the same act, 8 U.S.C.A. 224(a), defines the United States as follows:

"The term 'United States' when used in a geographical sense, means the states, the Territories of Hawaii and Alaska * * *."

It is a well settled fact that aliens of other countries who have been admitted to the territory of Hawaii for permanent residence are likewise lawfully admitted to the continental United States for permanent residence. There is no reason why this appellee should be considered in any different category.

The appellee is charged with violation of the Immigration Act of 1924. It is specifically charged that the appellee is an immigrant not in possession of valid immigration visa, Section 13 of the Immigration Act of 1924, 8 U.S.C.A. 213. This Section provides:

"Sec. 13 (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa * * *."

(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa."

The provisions of the Immigration Act of February 5, 1917, as quoted by the appellant on page 20, are not applicable to the facts in the instant case. The Act of 1917 is qualitative in scope and the appellee has not been charged with violation of any of the provisions contained therein.

There is no doubt that after the appellee's departure from the United States as a seaman his subsequent return to the United States from a foreign port, constitutes a new entry into the United States within the intent and meaning of the Immigration laws.

However, upon his return to the United States from foreign, as a seaman in 1947, the appellee was entitled to the benefits of 8 C.F.R. 175.45(b) if he was at that time a lawful permanent resident of the United States. Part 175.45 of the Code of Federal Regulations, Title 8, provides:

"Immigrants required to present passports but not permits to enter. Aliens who are lawful permanent residents of the United States, and who fall within the following categories are exempt from the requirements of presenting permits to

enter, inasmuch as the requirement thereof is waived, but must present passports:

- (b) An Alien occupationally a seaman, who is returning in accordance with the terms of the articles of outward voyage, * * *."

Part 175.41(k), Title 8, Code of Federal Regulations, defines a seaman as "any alien whose occupation or calling as such is bona fide, and who is employed in any capacity on board any vessel arriving in the United States from any place outside of the United States."

In accordance with the definition of the Immigration Act of 1924, this appellee has resided continuously in the United States since the time of his original admission for permanent residence in 1931. His continuous service in pursuit of his calling as a seaman for approximately twelve years aboard American-owned vessels with home ports in the United States certainly is no indication of abandonment of residence therein. As a lawfully admitted permanent resident of the Territory of Hawaii, unless otherwise restricted by the provisions of Section 8(a)(2) of the Philippine Independence Act, the appellee must also be considered as a legal permanent resident of the continental United States in accordance with the provisions of the definition contained in the Immigration Act of 1924.

As specifically provided in Section 14 of the Philippine Independence Act, upon the granting of independence on July 4, 1946, he is entitled to the benefits

of the immigration laws of the United States to the same extent as a citizen of any other country.

There is nothing in any of the statutory immigration laws, or the regulations adopted thereunder, which specifically provides that a person of the Filipino race should be considered in a different category than that applicable to any other alien. Like any other alien, this appellee was not required to present any document upon his return at the port of Norfolk, Virginia in 1947.

Inasmuch as the appellee was entitled to the benefits of 8 C.F.R. 175.45 upon the occasion of his last entry to the United States, the charges contained in the Immigration Warrant of Arrest and the Warrant of Deportation can not be sustained.

The ruling of the Immigration and Naturalization Service ordering his deportation to the Philippine Islands is erroneous as a matter of law, and constitutes a denial of due process of law contrary to the Fifth Amendment to the Constitution of the United States. *Kessler v. Strecker*, 307 U.S. 22, 83 L. Ed. 1082.

In addition to the case cited in the argument, attention of the court is respectfully invited to the following cases which deal with the status of Philippine citizens:

U. S. v. Gancy, 54 F. Supp. 755, affirmed 149 F. (2d) 788, certiorari denied 66 S. Ct. 299, 90 L. Ed. 463;

*Suspine et al. v. Compania Translatlantica
 Centroamericana*, 37 F. Supp. 263;
Rogue Espiritu De La Ysla v. United States,
 37 F. Supp. 263;
Alfara v. Fross, 26 C. (2d) 358;
People v. Cordero, 50 C.A. (2d) 146;
DeCano v. State, 7 Wash. (2d) 613.

CONCLUSION.

It is respectfully submitted that the provisions of Section 8(a)(2) of the Philippine Independence Act of 1934 became obsolete upon granting a complete sovereignty to the Philippine Islands on July 4, 1946; that this appellee at the time of his last arrival in 1947 was a lawful permanent resident of the United States and as such entitled to the benefits of the general waiver of visa requirements provided for alien seamen.

Wherefore, it is submitted that the decision of the District Court be affirmed.

Dated, San Francisco, California,
 December 19, 1951.

Respectfully submitted,

JOSEPH S. HERTOGS,

Of JACKSON & HERTOGS,

Attorney for Appellee.

No. 13,107

IN THE

United States Court of Appeals
For the Ninth Circuit

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,

Appellant,

vs.

LOPE M. VARLETA,

Appellee.

REPLY BRIEF FOR APPELLANT.

CHAUNCEY TRAMUTOLO,
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On the Brief.

FILED

JAN - 2 1952

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No. 13,107

IN THE

**United States Court of Appeals
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Appellant,

vs.

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Appellee.

REPLY BRIEF FOR APPELLANT.

Counsel for appellee on page 7 of his brief states that it has been stipulated that the appellee is a lawful resident alien of the Hawaiian Islands by reason of his admission to that Territory prior to the Philippine Independence Act of 1934. (Emphasis supplied.)

The specific facts stipulated to by the Government was that appellee's entry as a stowaway in the Hawaiian Islands in the year 1931 was considered a lawful entry. No stipulation was entered into that appellee has a lawful permanent residence in the Hawaiian Islands at the present time. In fact, the appellant in his opening brief contended that appellee

abandoned any legal domicile he may have had in the Hawaiian Islands and asserts at this time that appellee has failed to maintain a lawful residence in the Islands of Hawaii.

Appellee concedes and the Court below held that between the effective date of the Philippine Independence Act and July 4, 1946, Filipino citizens who had been admitted only to Hawaii were subject to the provisions of Section 8(a)(2) of the Act of 1934. Appellee's illegal entry to Continental United States on April 6, 1935, being not in accordance with the aforesaid provisions of the Act of 1934, it cannot be said that appellee has a legal residence in the Continental United States.

Appellee makes much of the point that if he were otherwise qualified, he would be eligible for naturalization.

Counsel for appellee on page 14 of his brief then makes the following erroneous assumption that:

"If a person has an admission to the United States, which is valid for naturalization, which is a privilege and not a right, he must also have a valid admission to the United States for immigration purposes."

As stated in its opening brief, the Government has shown that the statutes covering naturalization are separate and apart from those statutes regulating immigration. There are several classes of persons who might be deportable on immigration charges but because of specific statutes regulating their naturaliza-

tion may at the same time be found eligible for naturalization.

A case analogous to the contentions made by appellee is that of a former United States citizen woman who lost such citizenship by virtue of her marriage to an alien prior to September 22, 1922 who then took up residence abroad. In such case, the woman might enter the United States illegally or contrary to immigration laws and be subject to deportation, but because of the specific nationality statute, which is not concerned with the manner or place of entry, the woman could, notwithstanding her deportability, be naturalized. Similar Congressional acts relating to naturalization, in the past have made it possible for members of the Armed Forces of the United States and Seamen to become naturalized citizens of the United States notwithstanding that they were, at the same time, deportable for violation of immigration laws. In so far as Filipino persons are concerned, Congress has passed a statute (Section 321(a) of the Nationality Act of 1940) regulating their nationality which reads as follows:

“Certificates of arrival or declarations of intention shall not be required of Filipino persons or persons of Filipino descent who are citizens of the Commonwealth of the Philippines on the date of the enactment of this Section, and who entered the United States prior to May 1, 1934, and have since continuously resided in the United States. The term ‘Filipino persons or persons of Filipino descent’ as used in this Act shall mean persons of a race indigenous to the Philippine

Islands and shall not include persons who are of as much as one-half of a race ineligible to citizenship."

It may thus be seen that as in the categories mentioned supra, Congress was not concerned with the *entry* of persons embraced within the statute, and a person of Filipino citizenship may be naturalized notwithstanding that he too may be subject to deportation.

One must, therefore, logically conclude that although a person may be eligible for naturalization, it does not necessarily mean that he had a valid admission to the United States for immigration purposes.

Wherefore, appellant prays that the order of the District Court be reversed and that appellee be remanded to the custody of the Immigration and Naturalization Service.

Dated, San Francisco, California,
January 2, 1952.

CHAUNCEY TRAMUTOLO,
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Assistant United States Attorney,

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MORTON M. LEVINE,

Adjudication Section, Immigration and Naturalization Service,

On the Brief.

United States
Court of Appeals
for the Ninth Circuit.

SAMUEL NELSON, Individually, and as an Heir,
Devisee and Legatee of Olof Zetterlund, De-
ceased, Suing on His Own Behalf and on
Behalf of All Other Heirs, Devisees and Lega-
tees of Olof Zetterlund, Deceased, Similarly
Situated,

Appellant,

vs.

DORA MILLER and HAROLD M. DAVIDSON,
Both Individually and as Pretending Co-Execu-
tors, or Co-Executors de son tort, of the Estate
of Olof Zetterlund,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILED

JAN - 1 1952

United States
Court of Appeals
for the Ninth Circuit.

SAMUEL NELSON, Individually, and as an Heir,
Devisee and Legatee of Olof Zetterlund, De-
ceased, Suing on His Own Behalf and on
Behalf of All Other Heirs, Devisees and Lega-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Exhibits Attached to the Complaint

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Exhibit No. 3

Transcript of Portions of the Record in the Original Administration Proceedings Pending in the County Judge's Court in and for Dade County, Florida, Probate No. 16,650:

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NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil No. 7545-B

SAMUEL NELSON, Individually; and as an Heir,
Devisee and Legatee of Olof Zetterlund, De-
ceased, Suing on His Own Behalf and on Be-
half of All Other Heirs, Devisees and Legatees
of Olof Zetterlund, Deceased, Similarly Situ-
ated; and as Sole Domiciliary Executor of the
Estate of Olof Zetterlund, Deceased; and as
Trustee of an Express Trust,

Plaintiff,

vs.

DORA MILLER and HAROLD M. DAVIDSON,
Both Individually and as Pretending Co-Execu-
tors, or Co-Executors De Son Tort, of the
Estate of Olof Zetterlund, Deceased,

Defendants.

COMPLAINT

The plaintiff, Samuel Nelson, in the following capacities: (a) individually; (b) as an heir, devisee and legatee of Olof Zetterlund, Deceased, suing on his own behalf and on behalf of all other heirs, devisees and legatees of Olof Zetterlund, Deceased, similarly situated; (c) as sole domiciliary executor of the Estate of Olof Zetterlund, Deceased; (d) and as trustee of an express trust, a copy of [2*] which is hereto attached, made a part hereof and marked

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Exhibit 1, by and through his attorneys, O'Connor & O'Connor, 530 West Sixth Street, Los Angeles, California, brings this action against Dora Miller and Harold M. Davidson, in the following capacities: (a) individually; (b) as pretending co-executors of the Estate of Olof Zetterlund, Deceased; (c) and as co-executors de son tort of the Estate of Olof Zetterlund, Deceased.

Plaintiff is an adult, resident and citizen of Essex County, State of New Jersey. Each of the defendants is an adult and resident of Los Angeles County, State of California. Neither of the defendants is in the military or naval service of the United States. The matter in controversy is of a civil nature and exceeds, exclusive of interest and costs, the sum of \$3,000.00.

First Claim

Foreign Judgment

1.

Plaintiff incorporates herein the foregoing introductory paragraph.

2.

Olof Zetterlund died testate in Los Angeles County, California, on August 21, 1945. At the time of his death, Olof Zetterlund was a resident and citizen of and domiciled in Dade County, Florida. The residence, citizenship and domicile of Olof Zetterlund at the time of his death has been adjudicated by the County Judge's Court in and for

Dade County, Florida, a constitutional court having exclusive jurisdiction over the administration of the Estate of decedent, in a proceeding to which each of the defendants [3] personally was a party. (See decisions of the Supreme Court of Florida, the Court of last resort in the State of Florida, listed and cited in Exhibit 2, hereto attached and made a part hereof.) On December 31, 1946, the County Judge's Court of Dade County, Florida, rendered a final judgment adjudicating that Olof Zetterlund was domiciled in the County of Dade, State of Florida, at the time of his death, and was not domiciled in the State of California at the time of his death. Said judgment remains in full force and effect, and was rendered by said Court in proceedings instituted therein by each of the defendants. An exemplified copy of said judgment and antecedent proceedings relating thereto is hereto attached and made a part hereof, marked Exhibit 3 (see pages 105 to 107 thereof).

3.

As it is made to appear from the aforesaid exemplified copy of the record hereto attached and marked Exhibit 3, each of the defendants on October 2, 1945, (pages 68 to 71) submitted their persons and appeared generally in the domiciliary administration proceedings of the Estate of Olof Zetterlund, Deceased, then pending in the County Judge's Court in and for Dade County, Florida, and that at all times subsequent to said October 2, 1945, each of the defendants was personally

amenable and subject to the jurisdiction of said Court.

4.

On February 26, 1947, the aforesaid County Judge's Court in and for Dade County, Florida, in the aforesaid proceedings (In re Estate of Olof Zetterlund, Deceased, Probate No. 16,650) in which each of the defendants had appeared personally and submitted themselves to the jurisdiction of the Court, rendered a final judgment against each of the defendants, a copy of [4] which appears in the exemplified record (pages 138 to 141) of Exhibit 3 hereto attached. Said final judgment was rendered after due notice to each of the defendants upon plaintiff's petition (see pages 126 to 134 of Exhibit 3). Upon the rendition of said final judgment, the same was made effective upon service of a copy of the same upon each of the defendants, all of which is more fully shown by said Exhibit 3, pages 142, 143. Said final judgment, rendered on February 26, 1947, remains in full force and effect, and has not been vacated, reversed or modified. The said final judgment remains wholly unpaid and unsatisfied, and neither of the defendants has complied with or performed the terms and conditions of said final judgment.

5.

The property of Olof Zetterlund, Deceased, which each of the defendants, by said final judgment rendered February 26, 1947, was directed to pay and deliver to the plaintiff, and was constituted in-

tangible personal property and tangible personal property, the situs of which was never in California, but was in the State of Florida. By and in said final judgment rendered February 26, 1947, it was further adjudicated that each of the defendants had "illegally and wrongfully withdrawn" from several designated New York banks certain funds belonging to the Estate of Olof Zetterlund, Deceased, which should have been delivered to the plaintiff, as domiciliary executor of the Estate of Olof Zetterlund, Deceased.

6.

The aforesaid judgment of February 26, 1947, is one to which this Court and the Courts of California must give full faith and credit under the provisions of Section 1, Article IV, [5] of the Constitution of the United States.

Prayer as to First Claim

Wherefore, plaintiff prays:

(a) That the aforesaid judgment of February 26, 1947, be given full faith and credit, to which it is entitled under the aforesaid provisions of the Constitution of the United States.

(b) That the aforesaid judgment of February 26, 1947, be made a judgment of this Court.

(c) That each of the defendants in their various capacities be required to perform and satisfy each of the provisions of the said judgment dated February 26, 1947, and that the goods, chattels,

lands, tenements and estate of each of the defendants be subjected to the satisfaction of said judgment.

(d) That each of the defendants be adjudged in contempt of Court for their refusal and failure to comply with the terms and provisions of said judgment dated February 26, 1947.

Second Claim

Resulting Trust, Together With Alternative Relief Therefor

1.

Plaintiff incorporates herein the foregoing introductory paragraph immediately preceding the First Claim.

2.

Olof Zetterlund was born in Sweden on December 17, 1858, and emigrated to the United States when about twenty-one years of age. He became a citizen of the State of Florida sometime during the latter part of the nineteenth century and acquired large tracts of ocean front land situated in that state, the greater portion of which he owned at the time of his death. [6] Olof Zetterlund died testate on August 21, 1945. Olof Zetterlund died without issue and left no surviving spouse. At the time of his death Olof Zetterlund was a resident and citizen of the State of Florida.

During the year 1927 Olof Zetterlund employed the defendant, Dora Miller, as his housekeeper,

which employment relationship continued thereafter until his death. Dora Miller was over thirty years younger than Olof Zetterlund, and throughout the last years of the life of Olof Zetterlund, she completely dominated and controlled his activities.

4.

During the fall of 1941, while Olof Zetterlund was a citizen and resident of the State of Florida, and when Olof Zetterlund was infirm, ill, senile, aged, and physically and mentally incapacitated, the defendant, Dora Miller, persuaded him to go to the State of California with her for a short visit on account of his health. Olof Zetterlund and the defendant, Dora Miller, arrived in the State of California in the fall of 1941. After the arrival Olof Zetterlund and Dora Miller, as aforesaid, in California, the condition of Olof Zetterlund became progressively worse. Olof Zetterlund soon lost his power of locomotion, his power of speech and his ability to write and read. In 1942 Dora Miller, through artifice practiced on Olof Zetterlund, or otherwise, gained complete and exclusive possession and control of the funds and bank accounts of Olof Zetterlund, with full power of withdrawal of the same. At the time Olof Zetterlund thus went to California, he was seized and possessed with large bank accounts in several banks in the City of New York, State of New York, the City of Miami, State of Florida, in Sweden, [7] and elsewhere. Said accounts aggregated approximately \$100,000.00, all of which funds were dissipated by Dora Miller

during the period beginning with the arrival of Olof Zetterlund in California in the fall of 1941.

5.

During the latter part of 1943, the defendant, Dora Miller, with the cooperation, assistance and advice of the defendant, Harold M. Davidson, undertook to acquire real and personal property in the name of Dora Miller with funds belonging to Olof Zetterlund, and in the execution of said plan, the defendant, Dora Miller, caused to be procured, delivered and recorded a grant deed, a copy of which is hereto attached, made a part hereof and marked Exhibit 4. Said deed conveyed to the defendant, Dora Miller, an unmarried woman, the following described property situated in Los Angeles County, State of California, to wit:

The Southerly 50 feet of the Northerly 64 feet of Lot 4, Tract 9202, as per map recorded in Book 153, pages 13 and 14 of Maps in the office of the Recorder of said County.

Said property also is known as 525 North Del Mar Avenue, San Gabriel, California. Said deed bears date November 17, 1943, and was recorded on December 2, 1943, in the public records of Los Angeles County, California, in Book No. 20487 of Official Records, at page 157. At the time of the execution of said deed and at all times thereafter, a dwelling house was situated on the property conveyed by said deed, which dwelling house was occupied and used by Olof Zetterlund and Dora Miller continuously until the death of Olof Zetterlund, and there-

after by Dora Miller. At the time of the execution and delivery of said deed, the said dwelling house was unfurnished. Upon the execution and delivery of said deed, Dora Miller, with funds belonging to Olof Zetterlund, [8] elaborately furnished said dwelling house, which furniture and furnishings are still situated in said dwelling house.

6.

In the purchase of said property, both real and personal, the title to which was taken in the name of the defendant, Dora Miller, the following funds of Olof Zetterlund were used, to wit:

(a) The defendant, Dora Miller, withdrew the sum of \$5,801.76 of the funds of Olof Zetterlund with the Emigrant Industrial Savings Bank of New York, New York. Said withdrawal was by check bearing date November 13, 1943, and deposited by Dora Miller to her own individual account on November 18, 1943, with the Security-First National Bank of Los Angeles, California, and withdrawn from said bank on the written order of Dora Miller.

(b) The defendant, Dora Miller, withdrew the sum of \$5,000.00 of the funds of Olof Zetterlund with the Greenwich Savings Bank of New York, New York. Said withdrawal was by check bearing date on or about November 15, 1943, and deposited by Dora Miller to her own individual account on November 23, 1943, with the Security-First National Bank of Los Angeles, California, and withdrawn from said bank on the written order of Dora Miller.

(c) The defendant, Dora Miller, withdrew the sum of \$5,297.10 of the funds of Olof Zetterlund with the Seaman's Bank for Savings of New York, New York. Said withdrawal was by check bearing date December 20, 1943, and deposited by Dora Miller in a bank, the identity of which is [9] unknown to plaintiff, and withdrawn on the order of Dora Miller.

(d) The defendant, Dora Miller, withdrew the sum of \$4,908.36 of the funds of Olof Zetterlund with the First Federal Savings & Loan Association of Miami, Florida. Said withdrawal was by check bearing date December 27, 1943, and deposited by Dora Miller to her own individual account on February 11, 1944, with The Security-First National Bank of Los Angeles, California, and withdrawn from said bank on the written order of Dora Miller.

(e) Certain funds of Olof Zetterlund, out of his account with the First National Bank of Miami, Florida, the exact amount being to the plaintiff unknown, were also withdrawn by the defendant, Dora Miller.

7.

Upon the execution and delivery of the aforesaid deed, and while the property thereby conveyed was being used by Dora Miller and Olof Zetterlund as a dwelling house, all expenses and the care, management, maintenance and repair of said property was paid by the use of funds of Olof Zetterlund, withdrawn on the written order of Dora Miller, defendant.

8.

The aforesaid real and personal property constitutes in equity the property of Olof Zetterlund, now deceased, and therefore, is a part of the estate of Olof Zetterlund, Deceased. The defendant, Dora Miller, has no real, or equitable, or beneficial interest in and to said real property, and holds the legal title thereto in trust for the estate of Olof Zetterlund. The defendant, Dora Miller, wrongfully, illegally [10] and fraudulently claims title and ownership to said property and is now undertaking to sell and dispose of the same and appropriate the proceeds thereof.

9.

Plaintiff does not know the exact cost of the said real and personal property, but alleges that the defendant, Dora Miller, appropriated and used all of the aforesaid funds of Olof Zetterlund (comprising the aforesaid four specific items aggregating \$21,007.22, and other funds) in the purchase of the aforesaid real and personal property and its maintenance, repair, payment of taxes, insurance and utilities.

Prayer as to Second Claim

Wherefore, plaintiff prays:

(a) That a resulting trust be declared in the above-described real and personal property in favor of the estate of Olof Zetterlund, Deceased, and that the defendant, Dora Miller, be decreed to hold the legal title thereto in trust for the plaintiff, and be required to convey said property to the plaintiff, and to account for the reasonable rental and use

value of the said property by her during the entire period beginning with the execution and delivery of said deed and continuously thereafter, or,

(b) In the alternative, as provided by Rule 18, an accounting may be had, and the actual amount of funds of Olof Zetterlund used by the defendant, Dora Miller, in the acquisition of the above-described real and personal property and in the maintenance, operation, repair, utilities, including taxes and insurance and other kindred expenses, be ascertained and determined, and, if the said amount be greater than the value of said property, that the defendant, Dora Miller, be required to repay to the plaintiff said amount of [11] money, together with interest thereon, and that said indebtedness be decreed to be a lien on the above-described property, as well as other assets of the said Dora Miller.

(c) That the defendants be required to pay to the plaintiff all costs, expenses and attorneys' fees incurred or paid by the plaintiff in recapturing the property described in the Second Claim so as to indemnify and save harmless the plaintiff by reason of the wrongful acts of the defendants.

Third Claim

Accounting

1.

Plaintiff incorporates herein the foregoing introductory paragraph immediately preceding the First Claim.

2.

Plaintiff incorporates herein Paragraph 2 of the Second Claim.

3.

Plaintiff incorporates herein Paragraph 3 of the Second Claim.

4.

Plaintiff incorporates herein Paragraph 4 of the Second Claim.

5.

During the eighteen years while the aforesaid employment contract between Olof Zetterlund and Dora Miller was in effect, a fiduciary relationship existed between said persons. During said time Dora Miller pursued a plan of diverting to her own use large sums of money belonging to Olof Zetterlund. During the last four years of the lifetime of Olof Zetterlund, while he was physically and mentally [12] incapacitated, Dora Miller exercised exclusive and complete dominion and control over the affairs of Olof Zetterlund, and during said period Dora Miller appropriated unto herself a large portion of the estate and funds of Olof Zetterlund and dissipated a large portion of the funds and estate of Olof Zetterlund, the exact amount of which is to the plaintiff unknown. Dora Miller, with the cooperation, assistance and advice of Harold M. Davidson, her attorney, has secreted large portions of the funds and estate of Olof Zetterlund and refuses to deliver and pay the same over to the plaintiff.

Prayer as to Third Claim

Wherefore, plaintiff prays:

(a) That a general and specific accounting be had by each of the defendants of all their acts and doings on behalf of Olof Zetterlund during the lifetime of Olof Zetterlund and since the death of Olof Zetterlund, and that the use of funds and estate of Olof Zetterlund by said defendants be traced. That a money judgment be entered against each of the defendants in an amount equal to the funds and estate of Olof Zetterlund wrongfully appropriated by said defendants and each of them; and that all of the assets and property of each of the defendants acquired by the use of funds or property belonging to Olof Zetterlund be impressed with an equitable lien or trust in favor of the plaintiff, for the use and benefit of the Estate of Olof Zetterlund; and that the defendants, and each of them, be required to pay all costs, expenses and attorneys' fees incurred or paid by the plaintiff in the enforcement and prosecution of this his Third Claim. [13]

Fourth Claim

Enforcement of Federal Right

1.

Plaintiff incorporates herein the foregoing introductory paragraph immediately preceding the First Claim. Jurisdiction is founded on the existence of a Federal question, and the action also arises under the Constitution of the United States, Article IV,

Section 1, and an act of Congress of the United States, 28 U.S.C.A. 687.

2.

Plaintiff incorporates herein Paragraph 2 of the First Claim.

3.

Plaintiff incorporates herein Paragraph 3 of the First Claim.

4.

As it is made to appear from the aforesaid exemplified copy of the record hereto attached and marked Exhibit 3, the County Judge's Court of Dade County, Florida, a constitutional court with exclusive jurisdiction over the administration of the affairs of a decedent, assumed original domiciliary jurisdiction over the Estate of Olof Zetterlund, deceased, on August 30, 1945. On the succeeding day, August 31, 1945, the defendants, Dora Miller and Harold M. Davidson, sought to invoke the jurisdiction of the Superior Court of Los Angeles County, California, in a domiciliary administration proceedings of the estate of Olof Zetterlund, Deceased, and sought to procure their appointment as co-executors of the Estate of Olof Zetterlund, Deceased, and in an ex parte proceedings the said California Court appointed the defendants as co-executors of the Estate of Olof [14] Zetterlund, Deceased. Said proceedings thus instituted and prosecuted by the defendants in the Superior Court of Los Angeles County, California, was grounded upon the premise that Olof Zetterlund at the time of his death was domiciled in the

State of California, which premise, as herein alleged, was false and without foundation. Thereafter, the defendants and the State of California and its Controller submitted for adjudication to the County Judge's Court in and for Dade County, Florida, as is shown by the exemplified record thereof attached hereto and made a part hereof as Exhibit 3, three issues as follows:

(a) The domicile of Olof Zetterlund at the time of his death,

(b) The validity of a purported codicil (see pages 71 to 73, of Exhibit 3),

(c) The right of the defendants to serve as co-executors of the Estate of Olof Zetterlund, Deceased. Said issues thus presented by the defendants to the County Judge's Court of Dade County, Florida, were regularly made up by appropriate adversary pleadings presented by the parties thereto and duly tried before the said Court. The parties to this cause were parties to said cause. The defendants, together with the State of California and its Controller, not only submitted themselves to the jurisdiction of the said County Judge's Court in and for Dade County, Florida, in said cause, and presented said issues for adjudication, but prosecuted the same to completion, and the said Court adjudicated the same adversely to the defendants and the State of California and its Controller, which adjudication was embraced in the judgment and decree rendered on December 31, 1946 (pages 105 to 107, Exhibit 3), and the judgment and decree of January 17, 1947, (pages 108 to 112 [15])

of Exhibit 3). Thereafter the defendants and the State of California and its Controller prosecuted an appeal (pages 122 to 125 of Exhibit 3), resulting in a decision of affirmance (pages 144 to 151 of Exhibit 3). Thus it is that the aforesaid judgments and decrees, as shown in Exhibit 3 hereto attached, are binding on the defendants and the State of California and its Controller, and said adjudication has effectively concluded the following issues:

(a) Olof Zetterlund at the time of his death was domiciled in the State of Florida and not the State of California.

(b) The aforesaid purported codicil bearing date August 3, 1945, is null and void.

(c) The defendants are not co-executors of the Estate of Olof Zetterlund, Deceased.

(d) The aforesaid proceedings instituted and prosecuted by the defendants in the Superior Court of Los Angeles County, California, are null and void for want of jurisdiction.

5.

Notwithstanding the aforesaid judgments reflected in Exhibit 3 hereto attached, defendants still claim and pretend to claim and hold themselves out to the world as co-executors of the Estate of Olof Zetterlund, Deceased, and are attempting to exercise and are exercising the powers of said office, and are unlawfully, wrongfully and fraudulently interfering and intermeddling with the administration of the Estate of Olof Zetterlund by Samuel Nelson, as sole domiciliary executor thereof.

The defendants while thus pretending to be co-executors of the Estate of Olof Zetterlund, when in truth and in fact they are not, and while attempting to act as co-executors de son tort, have appropriated [16] unto themselves a large amount of the funds belonging to the Estate of Olof Zetterlund, Deceased, which amount exceeds the sum of \$3,000.00, exclusive of interest and costs, the exact amount of which is unknown to plaintiff.

Prayer as to Fourth Claim

Wherefore, plaintiff prays:

(a) That the defendants be enjoined from exercising any functions as co-executors of the Estate of Olof Zetterlund, Deceased.

(b) That an accounting be had and taken as to all actions of the defendants as pretending co-executors of the Estate of Olof Zetterlund, Deceased, or as co-executors de son tort of the Estate of Olof Zetterlund, Deceased.

(c) That the aforesaid proceedings initiated and prosecuted by the defendants in the Superior Court of Los Angeles County, California, be determined to be null and void for want of jurisdiction.

(d) That the defendants be compelled to recognize and give effect to the judgments of the County Judge's Court in and for Dade County, Florida, shown in the exemplified record, Exhibit 3.

O'CONNOR & O'CONNOR,

By /s/ WILLIAM V. O'CONNOR,

Attorneys for Plaintiff. [17]

EXHIBIT No. 1

Know All Men by These Presents,

Whereas, Olof Zetterlund died testate on August 21, 1945, and Samuel Nelson, ever since January 20, 1945, has been and is the duly appointed, qualified and acting domiciliary Executor of the Estate of Olof Zetterlund, Deceased (see In Re: Estate of Olof Zetterlund, Deceased, Probate No. 16,650, in the County Judge's Court in and for Dade County, Florida), and

Whereas, on February 26, 1947, a judgment was rendered by the County Judge's Court of Dade County, Florida, against Dora Miller and Harold M. Davidson in favor of the Estate of Olof Zetterlund, Deceased, which judgment is recorded in Probate Orders, Book 142, page 86, of said Court, and remains in full force and effect, and

Whereas, Dora Miller and Harold M. Davidson have wrongfully appropriated unto themselves large amounts of money and property, both intangible and tangible, belonging to Olof Zetterlund, now deceased, and are fraudulently secreting the same in the State of California.

Now, Therefore, I, Samuel Nelson, as domiciliary Executor of the Estate of Olof Zetterlund, Deceased, do hereby appoint and constitute Samuel Nelson, individually, as Trustee, to institute, maintain and prosecute such actions against Dora Miller and Harold M. Davidson as he may deem advisable, in the United States District Court in the State of California, to collect, receive, recapture and recover

all funds, moneys, property of whatsoever kind belonging to the Estate of Olof Zetterlund, Deceased, or in which Olof Zetterlund was interested at the time of his death, now standing in the name of Dora Miller and Harold M. Davidson, or either of them, directly or indirectly, or in their possession, custody or control, and upon its receipt to account for the same to the domiciliary Executor of the Estate of Olof Zetterlund, Deceased.

In Witness Whereof, I hereunto set my hand and seal in the City of Fort Lauderdale, Broward County, Florida, this the 10th day of June, 1947.

[Seal] /s/ SAMUEL NELSON,
Domiciliary Executor of the Estate of Olof Zetterlund, Deceased.

Signed, sealed and delivered in the presence of

/s/ C. A. HIAASEN,

/s/ HELEN WOODRUFF. [18]

EXHIBIT No. 2

Decisions of the Supreme Court of the State of Florida

Pournelle vs. Baxter,
142 Fla. 517, 195 So. 163,
Decided March, 1940;
151 Fla. 32, 9 So. 2. 162,
Decided July 7, 1942;

Crosby vs. Burleson,

142 Fla. 443, 195 So. 202,

Decided March, 1940;

Tyre vs. Wright,

144 Fla. 90, 197 So. 846,

Decided July, 1940;

State ex rel North vs. Judge Whitehurst,

145 Fla. 559, 1 So. 2. 175,

Decided December, 1940;

In re Niernsee's Estate,

147 Fla. 388, 2 So. 2. 737,

Decided June, 1941;

White vs. Bourne,

151 Fla. 12, 9 So. 2. 170,

Decided July, 1942;

Russ vs. Solomon,

152 Fla. 348, 12 So. 2. 121,

Decided February, 1943,

See previous dismissal of bill, 9 So. 2.
95, 96;

American Surety Company of New York vs.

Murphy,

151 Fla. 151, 9 So. 2. 355;

Decided July, 1942;

152 Fla. 862, 13 So. 2. 442,

Decided May, 1943;

Wells vs. Menn,

154 Fla. 173, 17 So. 2. 217,

Decided February, 1944;

In re Weltner's Estate,

Ulitzsch vs. Tolton,

154 Fla. 292, 17 So. 2. 396,

Decided March, 1944;

Krivitsky vs. Nye,

155 Fla. 45, 19 So. 2. 563,

Decided October, 1944;

In re Monks' Estate,

Luther vs. Florida Nat. Bank of Jacksonville,

155 Fla. 240, 19 So. 2. 796,

Decided November, 1944;

In re Peters' Estate,

Peters vs. Florida National Bank of Jacksonville,

155 Fla. 453, 20 So. 2. 487,

Decided January, 1945;

Ullendorff vs. Brown,

156 Fla. 655, 24 So. 2. 37,

Decided December 11, 1945. [19]

EXHIBIT No. 3

In the County Judge's Court in and for
Dade County, Florida

Probate No. 16,650

In Re: Estate of

OLOF ZETTERLUND, Deceased.

TRANSCRIPT OF PORTIONS OF THE REC-
ORD IN THE ORIGINAL ADMINISTRA-
TION PROCEEDINGS PENDING IN THE
COUNTY JUDGE'S COURT IN AND FOR
DADE COUNTY, FLORIDA

Probate No. 16,650 [20]

* * *

3.

On September 6, 1945, James Q. Burdet filed in this cause his petition for the probate of the Last Will and Testament of Olof Zetterlund, Deceased, bearing date June 9, 1937, which original Last Will and Testament was lodged in this Court, said petition being in the words and figures following:

(Caption and Style Omitted.)

Petition for Probate of Will

To the Honorable W. F. Blanton, Judge of Said
Court:

Comes now your petitioner, James Q. Burdet, whose residence is 214 6th Street, Miami Beach,

Exhibit No. 3—(Continued)

Dade County, Florida, and respectfully shows to this Honorable Court.

First: That Olof Zetterlund died at Los Angeles, California, on the 21st day of August, A.D. 1945, and at the time of his death he was a resident of Dade County, Florida, and was approximately eighty-five years of age; and at the time of his death was seized and possessed of a certain estate, situate and being in Dade and Broward Counties, Florida, which to the best of petitioner's knowledge consists of real estate situate in Dade and Broward Counties, Florida, and personal property described as stock in the Elsinore Beach Corporation and the Halland Land Company, all of which are of the approximate value of \$750,000.00.

Second: That the surviving heirs at law of the said decedent known to your petitioner are as set forth in the petition of Ellen W. Burdet, and the Will of the [33] decedent, filed heretofore in this Court.

Third: That said decedent died leaving a last will and testament, dated the 9th day of June, A.D. 1937, which said instrument was published and declared by the said decedent to be his Last Will and Testament, when he, the said decedent, was at least eighteen years of age, in the presence of E. L. Lockhart and P. A. Williams as attesting witnesses and in and by said instrument, a nephew Samuel Nelson of Maplewood, New Jersey, and Arvid Eric-

Exhibit No. 3—(Continued)

son of Cleveland, Ohio, were appointed Executors.

Fourth: That there is a serious question and great difficulty in determining who is legally qualified to act as Executor or Executors under said instrument and your petitioner requests this Honorable Court to appoint an Executor, Executrix or Administrator, C. T. A., in accordance with the laws and interpretations thereof of the State of Florida;

Fifth: Your petitioner further alleges that he has been the business manager of Olof Zetterlund, the deceased, for a number of years and at this time is more familiar with said decedent's estate and the properties involved therein than any other person; that he is the only legal representative of the said decedent in the State of Florida, having been appointed by this Honorable Court as Curator on the 30th day of August, 1945; and to the best of his knowledge and belief there are no heirs of the deceased within the State of Florida and the only beneficiary under the said Will in the State of Florida is Ellen W. Burdet who resides in Miami Beach, [34] Dade County, Florida.

Sixth: Your petitioner further alleges, on information and belief, that a paper writing which has heretofore been presented to this Honorable Court for probate upon the petition of Ellen W. Burdet, which was propounded for probate and record, was and is the Last Will and Testament of said decedent and was properly attested and signed by the said decedent in the presence of witnesses and in the

Exhibit No. 3—(Continued)

presence of each other, and is the Last Will and Testament of the said decedent.

Seventh: Your petitioner is of the opinion that it is his duty as having been business manager for the decedent personally and business manager of the Halland Land Company, a Florida corporation, and the Elsinore Beach Corporation, a Florida Corporation, being corporations of which the estate now owns approximately 95% of the stock evidenced by stock certificates which are now in the State of Florida and in the possession of your petitioner as curator, and knowing of his own personal knowledge from the desires of the decedent and from information he has obtained that the decedent was a resident of the State of Florida and has at all times considered his domicile within the State of Florida and that for the benefit of the estate the Will should be probated within the State of Florida;

Wherefore, your petitioner prays that the said paper writing heretofore propounded for probate in that certain petition filed by Ellen W. Burdet, be admitted to probate and record as and for the Last Will [35] and Testament of the said decedent and that this Honorable Court appoint the Executors named in the said instrument as Executors of the said estate if and provided they can qualify as such and that in the event the said Executors named in the Will cannot serve, then this Honorable Court appoint an Administrator or Administrators,

Exhibit No. 3—(Continued)

C. T. A., in accordance with the laws of the State of Florida.

And Your Petitioner Will Ever Pray, etc.

/s/ JAMES Q. BURDET.

/s/ GLYNN O. RASCO,
Attorney for Petitioner.

State of Florida,
County of Dade—ss.

The above-named James Q. Burdet, being by me duly sworn, says that the foregoing petition by him subscribed is true.

[Seal] /s/ L. B. SUTHERLAND,
Notary Public, State of
Florida at Large.

My commission expires Feb. 17, 1947. [36]

4.

On September 6, 1945, consequent upon said petition filed September 6, 1945, the Judge of this Court made and entered his order admitting to probate the Last Will and Testament of Olof Zetterlund, Deceased, bearing date June 9, 1937, which order was recorded in Book of Wills, Volume 122, page 32, being in the words and figures following:

(Caption and Style omitted.)

Exhibit No. 3—(Continued)

Order Admitting Will

By the County Judge of Said County:

The instrument presented by Glynn O. Rasco, attorney, as and for the Last Will and Testament of Olof Zetterlund, deceased, having been duly established by the sworn testimony of E. L. Lockhart, subscribing and attesting witnesses thereto, as being the true last Will and Testament of the said decedent and no objection being made to the probate thereof, and it having been made to appear to the County Judge of said County by due proof that the said decedent died on the 21st day of August, A.D. 1945,

It is therefore ordered, adjudged and decreed that the said Last Will and Testament, bearing date the 9th day of June, A.D. 1937, and attested by E. L. Lockhart and P. A. Williams, as subscribing and attesting witnesses thereto be, and the same is hereby admitted to probate according to law, as and for the true Last Will and Testament of said decedent, and that the said Will, [37] together with the petitions filed by Ellen W. Burdet, a legatee mentioned in said instrument, and James Q. Burdet, heretofore appointed Curator for said decedent's estate by this court, be duly recorded in the Book of Wills, and that the cost of recording same be taxed as costs against the estate.

(The following is a penned notation.)

That the appointment of a personal repre-

Exhibit No. 3—(Continued)

sentative of said estate be held in abeyance until the further order of court.

WFB

Given under my hand and seal at Miami, in said County and State, this 6th day of September, A.D. 1945.

[Seal] /s/ W. F. BLANTON,
County Judge. [38]

* * *

8.

On October 2, 1945, Dora Miller and Harold M. Davidson filed in this cause their petition for revocation of probate, the same being in words and figures as follows:

(Caption and Style Omitted.)

Petition for Revocation of Probate

To the Honorable W. F. Blanton, Judge of the
County Judge's Court, Dade County, Florida:

The petition of Dora Miller and Harold M. Davidson respectfully shows unto this Court as follows:

1. That the petitioner Dora Miller is legatee under the Last Will and Testament of the said Olof Zetterlund, deceased, and that the petitioners Dora Miller and Harold M. Davidson are Co-Executors of the Codicil to the Last Will and Testament of said Olof Zetterlund, deceased.

Exhibit No. 3—(Continued)

2. That an instrument alleged to be the Last Will and Testament of the said Olof Zetterlund, deceased, was admitted to probate by Your Honor on the 6th day of September, 1945, without notice to petitioners, and that your petitioners, being dissatisfied with the probate of said Will, now file this petition for revocation of probate thereof.

3. That the said Olof Zetterlund was a resident of the City of San Gabriel, County of Los Angeles, State of California, at the time of his death on August 21, 1945, and for some time prior thereto and was not a resident [94] of the State of Florida at the time of his death nor for some years prior thereto. Therefore, this Honorable Court does not have jurisdiction of said estate.

4. That the instrument probated as the Last Will and Testament of said Olof Zetterlund, deceased, is not the complete Last Will and Testament of the said Olof Zetterlund, deceased. That the said Zetterlund did on the 3d day of August, 1945, make, declare and publish a Codicil to his said original will dated June 9, 1937, in and by which Codicil he declared himself to be a resident of the County of Los Angeles, State of California.

5. That the said Codicil with a copy of the Will attached was filed for probate in the Superior Court of the State of California in and for the County of Los Angeles on August 31, A. D. 1945, and that the same was admitted to probate by order of said

Exhibit No. 3—(Continued)

Court on the 28th day of September, A.D. 1945. An exemplified copy of said proceedings in the Superior Court of the State of California in and for the County of Los Angeles, including: A petition for Probate of the Codicil of said Will, a copy of the original Will of the said Olof Zetterlund bearing date June 9, 1937, a copy of the Codicil to the Last Will and Testament of the said Olof Zetterlund dated the 3rd day of August, 1945, the order admitting the Codicil to Probate and for Letters Testamentary signed on September 28, 1945, and Letters Testamentary appointing Dora Miller and Harold M. Davidson as Co-Executors, dated September 28, 1945, is hereto attached, marked Exhibit "A" and made a part hereof. [95]

6. That Dora Miller and Harold M. Davidson, the duly appointed Co-Executors of the Estate of Olof Zetterlund, deceased, under said Codicil, are duly qualified and authorized to file this petition and to take such other steps as may be necessary herein.

Wherefore, Petitioners pray:

1. That the said Order Admitting the instrument alleged to be the Last Will and Testament of Olof Zetterlund, deceased, entered September 6, 1945, by this Court be revoked.

2. This this Court declare the residence of the said Olof Zetterlund at the time of his death to be in Los Angeles County, State of California.

Exhibit No. 3—(Continued)

3. That this Court admit the exemplified Codicil to the Last Will and Testament of Olof Zetterlund with the Will annexed, for probate and ancillary proceedings in this Court.

4. That petitioners be appointed Ancillary Executors of the Last Will and Testament and the Codicil thereof of said Olof Zetterlund, deceased, and, in the alternative, if the Court finds petitioners disqualified, that he appoint some suitable person as Ancillary Executor of the exemplified copy of the Codicil with the Will annexed of the said Olof Zetterlund, deceased.

/s/ J. C. SULLIVAN,
Atty. for Petitioners.

State of Florida,
County of Dade—ss.

Personally this day appeared before me, the undersigned authority, Harold M. Davidson, who, being first duly sworn, deposes and says that he is one of the petitioners [96] in the above and foregoing petition; that he has read said petition, knows the contents thereof, and that the same are true to the best of his knowledge and belief.

/s/ HAROLD M. DAVIDSON.

Exhibit No. 3—(Continued)

Sworn to and Subscribed before me this 2nd day of October, A.D. 1945.

[Seal] /s/ HELEN ECKHOFF,
Notary Public, State of
Florida at Large.

My commission expires 5/26/47.

Exhibit "A," referred to in the foregoing petition, is omitted from this transcript, except a copy of the purported Codicil of Olof Zetterlund bearing date August 3, 1945, which is as follows:

Codicil to Last Will and Testament
of Olof Zetterlund

I, Olof Zetterlund, a citizen of the city of San Gabriel, County of Los Angeles, State of California, being of sound mind and memory, do hereby declare this to be a Codicil to my last Will and Testament, made and executed by me on the 9th day of June, 1937, in the following manner:

First: I hereby re-affirm and re-allege each and every allegation and paragraph in my former Will, except Paragraph 21 and Paragraph 22 thereof. Inasmuch as I am now a resident of the County of Los Angeles, State of California, I wish to nominate and appoint local co-executors. I hereby delete Paragraph 21 from my former Will, and in place thereof make a new Paragraph 21, reading as follows: [97]

Exhibit No. 3—(Continued)

Lastly, inasmuch as I am now a resident of Los Angeles County, California, I hereby nominate, constitute and appoint Dora Miller of San Gabriel, California, and Harold M. Davidson, of Alhambra, California, as co-executors of my Last Will and Testament, and direct and authorize that they serve without bond, and it is my desire that the co-executors shall not sacrifice too much of the value of my estate unless in their opinion, it shall be absolutely necessary to do so in order to properly probate my will.

Second: I hereby delete from my former Will, Paragraph 22 wherein I gave and bequeathed to Samuel Nelson and Arvid Ericson, whom I had named as executors of that Will, \$1,000.00 each for their work as executors. It is my intention and desire that the newly named and appointed co-executors, Dora Miller and Harold M. Davidson, shall receive as remuneration for their services as my co-executors, such sum as the State of California provides shall be paid to the co-executors of my Last Will and Testament, and said sum paid for the services of co-executors shall be that set forth in the California statutes.

Third: I wish to add one additional paragraph to my Will, being Paragraph 25, reading as follows:

If any person or persons other than those named in this document shall prove themselves to be my legal heir and entitled to take any portion of my estate, to such person or persons, individually, I give the sum of One Dollar (\$1.00) only. [98]

Exhibit No. 3—(Continued)

Fourth: No other portion or paragraph of my Will is changed or altered in any manner whatsoever except as herein set forth as to Paragraph Twenty-First and Paragraph Twenty-Second of my Will of June 9, 1937, and the addition of Paragraph Twenty-Fifth.

In Witness Whereof, I have hereunto set my hand this 3rd day of August, 1945.

/s/ OLOF ZETTERLUND.

The above instrument was, at the day thereof, signed, sealed, published and declared, by the said Olof Zetterlund, as and for a Codicil to his Will, in the presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses thereof.

/s/ PEARL SINDELAR,
Of Los Angeles.

/s/ CHARLES SINDELAR,
Of Los Angeles. [99]

8-A.

Citation was duly issued, published and served on the petition of Dora Miller and Harold M. Davidson, filed as aforesaid on October 2, 1945, and thereafter, on October 11, 1945, Samuel Nelson, Constance Nelson Ericson and Arvid Ericson filed their joint and several defenses to said petition of Dora

Exhibit No. 3—(Continued)

Miller and Harold M. Davidson, the same being in words and figures following:

(Caption and Style Omitted.)

Defenses to Petition of Dora Miller and Harold M. Davidson for Revocation of Probate, Presented and Filed October 2, 1945

Now come Samuel Nelson, Constance Nelson Ericson and Arvid Ericson, jointly and severally, the same being "interested persons and persons interested in the estate" of Olof Zetterlund, deceased, and for defenses to the petition of Dora Miller and Harold M. Davidson for revocation of probate, presented and filed October 2, 1945, severally say:

(1) They deny that Dora Miller and Harold M. Davidson are co-executors of the Estate of Olof Zetterlund, deceased.

(2) They admit that the Last Will and Testament of Olof Zetterlund, bearing date June 9, 1937, was admitted to probate by order of this Court rendered on September 6, 1945. They deny the other averments of Paragraph 2 of said petition. [100]

(3) They deny that Olof Zetterlund was a resident of the City of San Gabriel, County of Los Angeles, State of California, at the time of his death on August 21, 1945. They say that Olof Zetterlund was a resident and citizen of the State of Florida at the time of his death on August 21, 1945.

Exhibit No. 3—(Continued)

(4) The Last Will and Testament of Olof Zetterlund, bearing date June 9, 1937, admitted to probate on September 6, 1945, constitutes the complete Last Will and Testament of said decedent. They deny that the said Olof Zetterlund made a Codicil on August 3, 1945.

(5) They say that the purported Codicil of August 3, 1945, and the proceedings had thereon, as described in Paragraph 5 of said petition, is a nullity and of no effect for that:

(a) The said Olof Zetterlund was not a resident of, nor domiciled in the State of California, at the time of his death.

(b) The said Codicil bearing date August 3, 1945, is spurious and not genuine.

(c) The said Codicil bearing date August 3, 1945, was made at the time when the said Olof Zetterlund did not possess testamentary capacity and was not of sound mind.

(d) The said Codicil bearing date August 3, 1945, was procured by the said Dora Miller and Harold M. Davidson through fraud, or duress, or mistake, or menace, or undue influence, and hence is null and void. [101]

(e) The proceedings in the Superior Court of the State of California, in and for the County of Los Angeles, described in Paragraph 5 of said petition, were had and conducted in the same Court in which the said Dora Miller and Harold M. Davidson instituted and prosecuted the following proceedings, to wit: On May 17, 1945, the said Dora Miller,

Exhibit No. 3—(Continued)

by and through the said Harold M. Davidson as her attorney, filed in said Court a petition for the appointment of a guardian of the person and estate of Olof Zetterlund, in which petition the said Dora Miller, under oath, alleged that the said Olof Zetterlund, then living, was incompetent and incapable of "caring for and managing his properties and his estate." Said petition was submitted to the Judge of said Court on May 23, 1945, together with medical proof that said Olof Zetterlund at said time was suffering from chronic senility. That the said Olof Zetterlund at said time was 85 years of age. Upon said petition and proof, the Judge of said Court, on May 23, 1945, entered an order adjudicating Olof Zetterlund incompetent and incapable of taking care of himself and managing his property, which order remained in full force and effect continuously thereafter until the time of the death of Olof Zetterlund. At the time of the making of said Codicil on August 3, 1945, the said Olof Zetterlund was under the disabilities of incompetency adjudicated by said Court upon the petition of the said Dora Miller and Harold M. [102] Davidson. That by virtue of said proceedings had and conducted in the State of California, by Dora Miller and Harold M. Davidson, they are now precluded and estopped from asserting that Olof Zetterlund possessed testamentary capacity on August 3, 1945, the date of the making of the purported Codicil. An exemplified copy of said incom-

Exhibit No. 3—(Continued)

petency proceedings is hereto attached and made a part hereof.

(f) The proceedings described in Paragraph 5 of said petition were had and taken in a Court which was wholly without jurisdiction over the Estate of Olof Zetterlund, Deceased.

(6) They deny that Dora Miller and Harold M. Davidson are the duly appointed co-executors of the Estate of Olof Zetterlund, deceased, under said Codicil.

(7) It is true that at the time of the death of Olof Zetterlund, on August 21, 1945, and for some time prior thereto, the said Dora Miller was his household servant or employee. That during said employment period and for several years preceding his death, the said Olof Zetterlund was infirm, senile, ill and incompetent. That during this period and while the said Olof Zetterlund was under the aforesaid disabilities, the said Dora Miller, with the actual knowledge, consent and acquiescence of the said Harold M. Davidson, her attorney, took advantage of the said Olof Zetterlund and wrongfully and unlawfully appropriated unto herself large sums of money and property of the said Olof Zetterlund and invested funds belonging to said Olof Zetterlund in real and personal property, and [103] took title thereto in the individual name of Dora Miller or other nominees. The exact amount of such wrongful and illegal appropriation of the funds and property of Olof Zetterlund by Dora

Exhibit No. 3—(Continued)

Miller is to the undersigned unknown. That the making of the aforesaid purported Codicil on August 3, 1945, by Olof Zetterlund, was at the instance and direction of Dora Miller and Harold M. Davidson, pursuant to a design and scheme on their part to gain control over all the assets of Olof Zetterlund, deceased, and was made at the time when Olof Zetterlund was on his deathbed and wholly without testamentary capacity.

(8) At the time of the making of the purported Codicil on August 3, 1945, the said Olof Zetterlund was not of sound mind, and was wholly without testamentary capacity, and that by reason thereof the said purported Codicil is null and void.

McCUNE, HIAASEN &
FLEMING,

Broward Bank & Trust Building, Fort Lauderdale,
Florida.

By /s/ C. A. HIAASEN,
Attorneys for Samuel Nelson, Constance Nelson
Ericson and Arvid Ericson.

State of Florida,
County of Broward.

Before me, the undersigned authority, personally appeared C. A. Hiaasen, who being first duly sworn, says that he is of counsel for the above Samuel Nelson, Constance Nelson Ericson and Arvid Ericson; that on the 9th day of October, 1945, he did

Exhibit No. 3—(Continued)

mail a true and complete copy of the foregoing defenses to Mr. John C. Sullivan, Attorney at Law, Ingraham Building, Miami 32, Florida, who is the attorney of record for Dora Miller and Harold M. Davidson. [104]

/s/ C. A. HIAASEN.

Subscribed and sworn to before me this 9th day of October, 1945.

[Seal] /s/ HELEN WOODRUFF,
Notary Public, State of
Florida at Large.

My commission expires 2-13-46.

8-B.

There was attached to the foregoing defenses and made a part thereof an exemplified copy of the California incompetency proceedings of Olof Zetterlund, now deceased, described in said defenses, the same being a record of the proceedings had in the Superior Court of the State of California, in and for the County of Los Angeles, entitled: "In the Matter of the Guardianship of the Person and Estate of Olof Zetterlund, an Incompetent Person, No. 243553," which transcript of proceedings is not included herein. [105]

8-C.

On November 19, 1945, J. M. Lee, Comptroller of the State of Florida, as Commissioner of Reve-

Exhibit No. 3—(Continued)

nue of the State of Florida, filed his "Amended Motion to Dismiss Petition of Dora Miller and Harold M. Davidson for Revocation of Probate, Presented and filed October 2, 1945," being in words and figures following:

(Caption and Style Omitted.)

Amended Motion to Dismiss Petition of Dora Miller and Harold M. Davidson for Revocation of Probate, Presented and Filed October 2, 1945

Comes now J. M. Lee, Comptroller of the State of Florida, as Commissioner of Revenue of the State of Florida, by his attorney undersigned, and respectfully sheweth unto the Court:

1.

That under and by virtue of the statutes of Florida, he is charged with the administration and the collection of taxes against estates of decedents and as such is vitally interested in the determination of the domicile of the decedent, Olof Zetterlund.

2.

Wherefore, the court is respectfully requested to consider the following:

Amended Motion to Dismiss

On behalf of the State of Florida, as represented by the Comptroller, J. M. Lee, in his capacity as Commissioner of Revenue, and as grounds for the Motion to [106] Dismiss, going to each and every

Exhibit No. 3—(Continued)

portion of the petition of Dora Miller and Harold M. Davidson for Revocation of Probate, which seeks to place the domicile of Olof Zetterlund in California, your movant sets up the following:

(a) That the aforesaid petition shows upon its face that Olof Zetterlund was at all times prior to and up to the time of his death domiciled in the State of Florida.

(b) That said petition shows upon its face that it is a studied attempt to deprive the State of Florida of jurisdiction of this estate by a purported change in domicile which is not borne out by any facts alleged in said petition.

J. M. LEE,

Comptroller of the State of Florida, as Commissioner of Revenue of the State of Florida.

By /s/ LEWIS H. TRIBBLE,

His Attorney.

State of Florida,
County of Leon.

Before me, the undersigned authority, personally appeared Lewis H. Tribble, who being first duly sworn says that he is counsel for the above J. M. Lee, Comptroller of the State of Florida, and that on the 17th day of November, 1945, he did mail a true and complete copy of the foregoing Amended Motion to Dismiss to:

Mr. Ernest A. Eklund, Attorney at Law,
33 South Clark Street, Chicago, Illinois; and

Exhibit No. 3—(Continued)

Mr. Glynn O. Rasco, Attorney at Law, 835 Lincoln Road, Miami Beach, Florida, [107] who are attorneys of record for Karin Zetterlund; and

McCune, Hiaasen and Fleming, Attorneys, Broward Bank and Trust Building, Ft. Lauderdale, Florida, who are attorneys for Samuel Nelson, Constance Nelson Ericson and Arvid Ericson; and

Mr. John C. Sullivan, Attorney, Ingraham Building, Miami, Florida, who is attorney for Dora Miller and Harold M. Davidson.

/s/ LEWIS H. TRIBBLE.

Sworn to and subscribed before me this 17th day of November, 1945.

[Seal] /s/ LOIS LANG,
Notary Public. [108]

8-D.

On November 19, 1945, J. M. Lee, Comptroller of the State of Florida, as Commissioner of Revenue of the State of Florida, filed his "Amended Answer to Petition of Dora Miller and Harold M. Davidson for Revocation of Probate, Presented and Filed October 2, 1945," being in words and figures following:

(Caption and Style Omitted.)

Exhibit No. 3—(Continued)

Amended Answer to Petition of Dora Miller and
Harold M. Davidson for Revocation of Probate,
Presented and Filed October 2, 1945

Comes now J. M. Lee, Comptroller of the State
of Florida, as Commissioner of Revenue of the
State of Florida, by his attorney undersigned, and
respectfully sheweth unto the court:

1.

That under and by virtue of the statutes of
Florida he is charged with the administration and
the collection of taxes against estates of decedents
and as such is vitally interested in the determina-
tion of the domicile of the decedent, Olof Zetterlund.

2.

Wherefore the court is respectfully requested to
permit the filing of the following:

Amended Answer to Petition

On behalf of the State of Florida, as represented
by the Comptroller, J. M. Lee, in his capacity as
Commissioner of Revenue, and answering the afore-
said [109] petition, avers the following:

(a) He admits that the last will and testament
of Olof Zetterlund bearing date of June 9, 1937,
was admitted to probate by order of this court
rendered on September 6, 1945.

(b) He denies that Olof Zetterlund was a resi-
dent of the city of San Gabriel, County of Los

Exhibit No. 3—(Continued)

Angeles, State of California, at the time of his death on August 21, 1945, and on the contrary says that Olof Zetterlund was a resident and citizen of the State of Florida, on August 21, 1945.

(c) He denies any and every averment in said petition with respect to the domicile of Olof Zetterlund being in the State of California at the time of his death.

(d) He alleges affirmatively that at the time the said Olof Zetterlund was transported to the State of California by Dora Miller, his housekeeper and nures, he was over 80 years of age and in his dotage, without mental capacity sufficient to have the intent to change his domicile.

(e) That for many years prior to and at the time of his death, he reported to the tax assessing authorities of the State of Florida, the amount of his intangible tax for the purpose of paying same as a resident of Florida, and filed his annual income tax return with the Federal Government in the Jacksonville, Florida, office.

(f) That prior to the date of the purported codicil, [110] the validity of which is hereby denied, proceedings were brought by Dora Miller, the decedent's housekeeper and nurse, represented by Harold M. Davidson, for the appointment of a guardian in California, upon the grounds that he was incapable of handling his own affairs and that in these proceedings evidence was submitted which was sufficient to satisfy the court that the said Olof Zetterlund was so old, aged, infirm and childish as

Exhibit No. 3—(Continued)

to be incapable of conserving his estate. Whereupon, the aforesaid Dora Miller, represented by Harold M. Davidson, was appointed guardian. Thereaftter, the aforesaid Dora Miller and Harold M. Davidson, taking advantage of the condition set up and established by said guardianship proceeding, and with the intent to deprive the State of Florida of the right to have the administration of this estate within its borders, did cause to be placed in said purported codicil a statement that the domicile of the decedent was in California.

J. M. LEE,

Comptroller of the State of Florida, as Commissioner of Revenue of the State of Florida.

By /s/ LEWIS H. TRIBBLE,
His Attorney.

State of Florida,
County of Leon.

Before me, the undersigned authority, personally appeared Lewis H. Tribble, who being first duly sworn says that he is counsel for the above J. M. Lee, Comptroller of the State of Florida, and that on the 17th day of November, 1945, he did mail a true and complete copy of the foregoing Amended Answer to Petition to: [111]

Mr. Ernest A. Eklund, Attorney at Law,
33 South Clark Street, Chicago, Illinois; and

Mr. Glynn O. Rasco, Attorney at Law, 835
Lincoln Road, Miami Beach, Florida, who are

Exhibit No. 3—(Continued)

attorneys of record for Karin Zetterlund; and McCune, Hiaasen and Fleming, Attorneys, Broward Bank and Trust Building, Ft. Lauderdale, Florida, who are attorneys for Samuel Nelson, Constance Nelson Ericson and Arvid Ericson; and

Mr. John C. Sullivan, Ingraham Building, Miami, Florida, who is attorney for Dora Miller and Harold M. Davidson.

/s/ LEWIS H. TRIBBLE.

Sworn to and Subscribed before me this 17th day of November, 1945.

[Seal] /s/ LOIS LANG,
Notary Public. [112]

8-E

On November 21, 1945, the interested persons hereinafter named, filed their defenses to the petition of Dora Miller and Harold M. Davidson, for revocation of probate presented and filed October 2, 1945, being in words and figures following:

(Caption and Style Omitted.)

Defenses to the Petition of Dora Miller and Harold M. Davidson for Revocation of Probate Presented and Filed October 2, 1945

In response to the citation dated October 11, 1945, returnable on or before November 22, 1945, issued consequent upon the "Petition for Revocation of

Exhibit No. 3—(Continued)

Probate" filed by Dora Miller and Harold M. Davidson on October 2, 1945, the undersigned, all of whom are the devisees, legatees and beneficiaries under the Last Will and Testament of Olof Zetterlund bearing date June 9, 1937, and therefore interested in said estate, jointly and severally file these defenses addressed to the "Petition for Revocation of Probate," filed by Dora Miller and Harold M. Davidson on October 2, 1945, and jointly and severally say:

(1) The undersigned do hereby jointly and severally adopt as their own the written "Defenses to Petition of Dora Miller and Harold M. Davidson for Revocation of Probate, Presented and filed October 2, 1945," filed jointly and severally on October 11, 1945, by Samuel Nelson, Constance Nelson Ericson and Arvid Ericson. [113]

(2) The undersigned do hereby jointly and severally appoint, designate and name as their attorneys and agents the law firm of McCune, Hiaasen & Fleming, whose specific address is Broward Bank & Trust Building, Fort Lauderdale, Florida.

(3) The names and specific addresses of the persons on whose behalf this pleading is made and filed, all of whom constitute devisees and legatees under the Last Will and Testament of Olof Zetterlund, deceased, are as follows:

(a) The following, all of whom are children of Johannes Zetterlund, now deceased, a brother of

Exhibit No. 3—(Continued)

Olof Zetterlund, and who are specifically named in the 16th paragraph of said Last Will and Testament:

David E. Zetterlund, Edgrensgatan 9, Arvika, Sweden.

Mrs. Hulda Zetterlund Anderson, Algarden, Arvika, Sweden.

Mrs. Signe Zetterlund Anderson, Kyrkogatan 26, Arvika, Sweden.

Gustaf Zetterlund, Horngatan 9, Arvika, Sweden.

Carl Zetterlund, Vansbro, Sweden.

(b) The following, all of whom are children of Britta Zetterlund Rensta, now deceased, a sister of Olof Zetterlund, deceased, and who are specifically named in the 17th paragraph of said Last Will and Testament: [114]

Ruth Rensta, also known as Rut Rensta, Dottevik, Arvika, Sweden.

Naemi Rensta, also known as Rebecka Naemi Rensta, Dottevik, Arvika, Sweden.

Hanna Rensta, Dottevik, Arvika, Sweden.

Mrs. Sara Elizabet Rensta Wallin Tyska, Fallet, Strasso, Sweden.

Gustaf Rensta, 207-A Lakeshore Road, Woodlands, Quebec, Canada, and c/o Canadian Pacific Airlines, 1011 Confederation Building, Montreal, Québec, Canada.

Ernfrid E. Rensta, also known as Enfrid E. Rensta, 3409 J Street, Sacramento 16, California.

Exhibit No. 3—(Continued)

(c) The following, all of whom are children of Kajsa Zetterlund Nelson, now deceased, a sister of Olof Zetterlund, deceased, and who are specifically named in the 18th paragraph of said Last Will and Testament:

Samuel Nelson, 2 Burnet Street, Maplewood, New Jersey.

Mrs. Hannah Elizabeth Nelson Wiren, also known as Mrs. Hanna Elizabeth Nelson Wiren, East Orange, New Jersey.

Mrs. Ester Maria Nelson Olofson, Madison, New Jersey.

Mrs. Constance Nelson Ericson, 13400 Shaker Boulevard, Cleveland, Ohio.

Lydia Caroline Nelson Bergen, Brooklyn, New York.

(d) The following, all whom are children of Eric Zetterlund, now deceased, a brother of Olof Zetterlund, deceased, and who are specifically named in the 19th [115] paragraph of said Last Will and Testament:

Mrs. Hulda Zetterlund Olsson, Takene, Brunsberg, Sweden.

Mrs. Maria Zetterlund Backlund, Skog, Brunsberg, Sweden.

Paul Eriksson Zetterlund, Lerhol, Edane, Sweden.

(e) These defenses are also being filed on behalf of

Mrs. Maria Zetterlund Anderson, N 60 Charottenberg, Sweden,

Exhibit No. 3—(Continued)

a daughter of Johannes Zetterlund, now deceased,
a brother of Olof Zetterlund, deceased.

(4) That all the persons on whose behalf this pleading is filed urge and request the Court to appoint Samuel Nelson as sole executor of the Last Will and Testament of Olof Zetterlund, deceased.

McCUNE, HIAASEN &
FLEMING,

By /s/ C. A. HIAASEN,

Attorneys for the Above
Persons Specifically Named.

State of Florida,
County of Broward.

Personally before me, the undersigned authority, appeared Martha Brooks, who, upon oath, says that she is a stenographer employed in the law offices of McCune, Hiaasen & Fleming, attorneys for the persons specifically named in the foregoing defenses, and in [116] pursuance of her duties as such she, on the 21st day of November, 1945, did mail to Mr. John C. Sullivan, attorney of record for Dora Miller and Harold M. Davidson in this cause, a true and complete copy of the above and foregoing defenses enclosed in an envelope bearing the requisition amount of United States uncanceled postage stamps, addressed as follows:

Mr. John C. Sullivan, Attorney at Law,
Ingraham Building, Miami, Florida,

Exhibit No. 3—(Continued)

by depositing each of said envelopes, properly sealed, stamped and addressed as aforesaid, in a receptacle provided by the United States Postal Department in the City of Fort Lauderdale, Florida, for the receipt of outgoing mail; and that the address on said envelope is the usual post office address of the said attorney. All on the 21st day of November, 1945.

/s/ MARTHA BROOKS.

Subscribed and sworn to before me this 21st day of November, 1945.

[Seal] /s/ HELEN WOODRUFF,
Notary Public, State of
Florida at Large.

My commission expires February 13, 1946. [117]

9.

On January 24, 1946, the State of California, by and through its Controller, Harry B. Riley, filed its petition for revocation of probate and for ancillary probate of will of Olof Zetterlund, being in words and figures following:

(Caption and Style Omitted.)

Petition for Revocation of Probate and for Ancillary Probate of Will of Olof Zetterlund

The petition of the state of California, by and through its Controller, Harry B. Riley, respectfully shows:

Exhibit No. 3—(Continued)

I.

That Olof Zetterlund died on August 21, 1945, and at the time of his death he was a resident and citizen of the state of California, residing in San Gabriel, county of Los Angeles, state of California.

II.

Formerly the said deceased was a resident of the state of Florida, and, while residing in Florida, he executed his last will and testament on June 9, 1937, and thereafter he removed to the state of California. On the third day of August, 1946, he made a codicil to his original will, in which he declared himself to be a resident of the state of California; said original codicil and a copy of said will were filed for probate in Los Angeles County, California, on August 31, 1945, and said codicil was admitted to probate in [118] said Los Angeles County, California, on September 28, 1945. A supplemental order was entered in said court on November 15, 1945, admitting said will to probate.

III.

In the meantime, James Q. Burdet, who is not related to the deceased but who had obtained possession of said original will, filed it in the Probate Court of Dade County, Florida, and, on September 6, 1945, he filed in said Probate Court a petition to probate said will, alleging that the deceased was a citizen of Dade County, Florida. The Honorable W. F. Blanton, Judge of said Probate Court,

Exhibit No. 3—(Continued)

admitted the will to probate on September 6, 1945, and held the appointment of a personal representative in abeyance until further order of the court. This order of probate does not state whether the deceased is a citizen or resident of Florida or not, and petitioner alleges that the deceased was not a citizen or resident of Florida at the time of his death, and that said original will should have been probated in California. The codicil to said will above mentioned has not been offered for original probate in Dade County, Florida.

IV.

Said probate in Dade County, Florida, was entered without notice to petitioner or to anyone else, and petitioner alleges that said probate should be revoked as an original probate and that said will should be probated in Dade County, Florida, in ancillary proceedings. An exemplified copy of the probate [119] proceedings in the Superior Court of the state of California, in and for the county of Los Angeles, showing the petition for the probate of said will and codicil, a copy of the original will, a copy of the codicil to said will, the orders admitting the codicil and will to probate, and a copy of the letters testamentary appointing Dora Miller and Harold M. Davidson as co-executors of said will, is now on file in the office of the County Judge of Dade County, Florida, and the same is hereby made a part of this petition by reference.

Wherefore, petitioner prays that the order of

Exhibit No. 3—(Continued)

the County Judge of Dade County, Florida, admitting the said original will of the deceased to original probate in Florida, dated September 6, 1945, be set aside and revoked; that, thereupon, said will and the codicil mentioned herein be admitted to probate in Dade County, Florida, in ancillary proceedings, and ancillary personal representatives be appointed by this honorable court; that this honorable court declare the residence and citizenship of the said Olof Zetterlund at the time of his death to have been in Los Angeles County, State of California, and that such other and further relief be granted to your petitioner as to this court may seem proper.

REDFEARN & FERRELL,

By /s/ D. H. REDFEARN,

Attorneys for Petitioner.

Morton L. Barker, being sworn by me, [120] the undersigned officer, says on oath that Harry B. Riley is the Controller of the State of California, and, as such Controller, is vested under the laws of said state with the duty of enforcing the inheritance tax laws; that affiant is authorized to make this affidavit; and that the statements contained in the foregoing petition are true.

/s/ MORTON L. BARKER.

Sworn to and subscribed before me, this the 14th day of January, 1946.

[Seal] /s/ ELNORA STANTON,

Notary Public. [121]

Exhibit No. 3—(Continued)

9-A.

On February 2, 1946, the following defenses were filed to said petition of the State of California and its Controller by the persons therein named, being in words and figures following:

(Caption and Style Omitted.)

Defenses of Samuel Nelson, Constance Nelson Ericson and Arvid Ericson, Addressed to "Petition for Revocation of Probate and for Ancillary Probate of Will of Olof Zetterlund" Filed by the State of California by and Through Its Controller, Harry B. Riley

Now come Samuel Nelson, Constance Nelson Ericson and Arvid Ericson, jointly and severally, and for defenses to the Petition of the State of California by and through its Controller for revocation of probate, thereupon say:

(1) They admit that Olof Zetterlund died on August 21, 1945. They deny that Olof Zetterlund at the time of his death was a resident and citizen of the State of California. They allege that Olof Zetterlund at the time of his death was a citizen of and domiciled in the State of Florida.

(2) They admit that Olof Zetterlund executed his Last Will and Testament on June 9, 1937, which Last Will and Testament was duly admitted to probate in this Court by order made and entered on September 6, 1945, in pursuance to law. They

Exhibit No. 3—(Continued)

deny that Olof Zetterlund made a codicil to his original will on August 3, 1945. [122] They say that the purported codicil, bearing date August 3, 1945, is null and void for that:

(a) The signature of Olof Zetterlund appearing on the purported codicil bearing date August 3, 1945, is spurious and not genuine.

(b) That at the time of the making of said codicil, on August 3, 1945, the said Olof Zetterlund was not of sound mind and did not possess testamentary capacity.

(c) The said purported codicil, bearing date August 3, 1945, was procured by Dora Miller and Harold M. Davidson through fraud, or duress, or mistake, or menace, or undue influence.

(3) The said Dora Miller and Harold M. Davidson are not related to Olof Zetterlund, deceased, within the third degree or any other degree.

(4) The persons, on whose behalf this pleading is filed, now interpose their Motion to Strike the Petition of the State of California by and through its Controller, Harry B. Riley, for revocation of probate, for that:

(a) The State of California by and through its Controller is neither a legatee, devisee, heir-at-law or beneficiary and hence is not entitled as a matter of law to institute such proceedings.

(b) The conditions and steps prescribed by the 1933 Probate Act for revocation of probate have not been had and taken.

Exhibit No. 3—(Continued)

(c) There is no provision in the 1933 Probate Act authorizing the filing of such petition. [123]

(5) The persons, on whose behalf these pleadings are filed, move to quash the "Notice of Taking Depositions de bene esse" given on behalf of the State of California and Harry B. Riley, Controller, Dora Miller and Harold M. Davidson, jointly, for that:

(a) No depositions can be taken on the Petition of the State of California and its Controller, Harry B. Riley, until said Petition has been put at issue.

(b) The said Petition for revocation of probate requires citation to all interested persons, which citation has not been given and, hence, said notice of taking depositions has not been given to all interested persons.

McCUNE, HIAASEN &
FLEMING,

/s/ C. A. HIAASEN,

Attorneys for Samuel Nelson, Constance Nelson
Ericson and Arvid Ericson.

State of Florida,
County of Broward.

Before me the undersigned authority personally appeared C. A. Hiaasen, who being first duly sworn, deposes and says that he is of counsel for Samuel Nelson, Constance Nelson Ericson and Arvid Ericson, named in the foregoing defenses;

Exhibit No. 3—(Continued)

that on January 31, 1946, he did mail a copy of the foregoing defenses to

Messrs. Redfearn & Ferrell, Attorneys for the State of California and its Controller, Harry B. Riley, Shoreland Building, Miami, Florida;

that on January 31, 1946, he did mail a copy of the foregoing defenses to [124]

Mr. John C. Sullivan, Attorney for Dora Miller and Harold M. Davidson, Ingraham Building, Miami, Florida.

/s/ C. A. HIAASEN.

Subscribed and sworn to before me this 31st day of January, 1946.

[Seal] /s/ HELEN WOODRUFF,
Notary Public, State of
Florida at Large.

My commission expires February 13, 1946. [125]

9-B.

On February 28, 1946, the State of Florida by and through its Comptroller, filed its answer to petition for revocation of probate and for ancillary probate of will of Olof Zetterlund, being in words and figures following:

(Caption and Style Omitted.)

Exhibit No. 3—(Continued)

Answer to Petition for Revocation of Probate and
for Ancillary Probate of Will of Olof Zetter-
lund

The State of Florida, by and through its Comptroller, J. M. Lee, as Commissioner of Revenue, answers the petition for revocation of probate and for ancillary probate of will of Olof Zetterlund heretofore filed by the State of California, by and through its Comptroller, Harry B. Riley, and respectfully says:

1.

That the State of Florida admits that Olof Zetterlund died on August 21, 1945, but denies that at the time of his death he was a resident or citizen of the State of California.

2.

That said deceased was, at the time of his death and for a long time prior thereto a resident of the State of Florida.

Wherefore, it is respectfully prayed that said petition of the State of California be denied.

/s/ LEWIS H. TRIBBLE,

Attorney for J. M. Lee,

Commissioner of Revenue.

Exhibit No. 3—(Continued)

9-C.

On April 13, 1946, Karin Zetterlund filed her answer to petition for revocation of probate and for ancillary probate of will of Olof Zetterlund, deceased, being in words and figures following:

(Caption and Style Omitted.)

Answer to Petition for Revocation of Probate and
for Ancillary Probate of Will of Olof Zetter-
lund, Deceased

Comes Now, Karin Zetterlund, by and through her undersigned attorneys, and Enfrid Rensta (also known as Fred Rensta) by and through his undersigned attorney, and file this their answer to the petition of the State of California and say:

1.

In answer to paragraph 1 of said petition, they admit that Olof Zetterlund died on August 21st, 1945, but deny that he was a citizen of the State of California.

2.

In answer to paragraph 2 of said petition, they admit that the deceased did reside in the State of Florida and did execute his Last Will and Testament on June 9, 1937, in Miami, Dade County, Florida, but deny that he removed to the State of California immediately thereafter. As to the execution of the Codicil to the original will in which Codicil he declared himself a resident of the State of California, the respondents have no knowledge of proceedings had in California. [127]

Exhibit No. 3—(Continued)

3.

In answer to paragraph 3 of said petition, they admit that James Q. Burdet, who is not related to the deceased, had possession of the original Will and did on September 6, 1945, file same, together with a petition with the Honorable W. F. Blanton, Judge of the Probate Court, and that the said Judge did admit the Will to probate and he did, then and there, appoint the said James Q. Burdet as Curator but did not appoint a personal representative other than said Curator, and held in abeyance the question as to the deceased being a citizen or resident of the State of Florida until further order of that Court.

4.

In answer to paragraph 4 of said petition, they admit that probate in Dade County, Florida, was entered without notice to the petitioners or to anyone else. In further answer to paragraph 4, respondents are without knowledge, and demand strict proof thereof.

RASCO & ESSLINGER,

By /s/ GLYNN O. RASCO,
Counsel for Enfrid Rensta and Associate Counsel
for Karin Zetterlund.

/s/ ERNEST A. EKLUND,
Counsel for Karin Zetterlund.

Exhibit No. 3—(Continued)

11.

Thereupon, after due consideration of said issues thus presented, the Honorable W. F. Blanton, Judge of said Court, on December 31, 1946, made and entered his judgment, order and decree, recorded in Record of Probate Orders, Book 140, page 228, being in words and figures as follows:

(Caption and Style Omitted.)

Order Denying Petition of the State of California,
et al., and Finding that Decedent Was a
Florida Resident at Time of His Death

This cause coming on to be heard upon the Petition of the State of California by and through its Comptroller, Harry B. Riley, for an Order revoking and setting aside that certain Order dated September 6, 1945, and recorded in Book of Wills 122 at page 32 in the Office of the County Judge in and for Dade County, Florida, which said Order admitted to probate the Will of Olof Zetterlund, deceased, dated June 9, 1937.

And Also upon the Petition of Dora Miller and Harold M. Davidson also praying that said Will be revoked, and each of said Petitions further praying that this Court declare the said Olof Zetterlund, deceased, to have been a resident of the State of California at the time of his death, and that this Court admit an exemplified copy of the Last Will and Testament and a Codicil thereto of said Olof

Exhibit No. 3—(Continued)

Zetterlund for Probate and Ancillary Proceedings in this Court, and that the [131] Petitioners Dora Miller and Harold M. Davidson be appointed Ancillary Executors of said Last Will and Testament and Codicil, or if said persons were disqualified to act as such, that the Court appoint some other suitable persons as such.

And the Court having considered said Petitions and the answer and amended answer filed by the State of Florida through its Comptroller J. M. Lee, and the motion and amended motion of the State of Florida to dismiss the said Petition filed by Dora Miller and Harold M. Davidson, and the Court having also considered each and all of the answers filed by various heirs of said Olof Zetterlund and of the legatees of Olof Zetterlund, deceased, under his said Will, and the Court having heard the testimony submitted by the parties to said proceeding, and having examined and considered all of the Exhibits introduced by the respective parties, and having carefully considered the Petitions filed, and each and every of the Answers filed, the testimony, the evidence and exhibits, and after due consideration thereof, finds that the said Olof Zetterlund, deceased, was at the time of his death, on, to wit, the 21st day of August, 1945, a resident and citizen of the State of Florida and the County of Dade, and that his said Last Will and Testament was rightfully and lawfully admitted to probate in Dade County, Florida, on September 6, 1945, as heretofore ordered.

Exhibit No. 3—(Continued)

It is Therefore, Ordered, Adjudged and Decreed that the said Petition of the State of California by and through its Comptroller Harry B. Riley, and the said Petition of Dora Miller and Harold M. Davidson, [132] and each and every the prayers thereof, be and the same are hereby denied, and that the said Will of Olof Zetterlund, deceased, heretofore admitted to probate in this Court remain in the records thereof, and that the probate proceedings thereon continue and proceed as an original and domiciliary administration and proceeding in this State and County.

It Is Further Ordered That the Motion and Amended Motion of the State of Florida by and through its Comptroller, J. M. Lee, to dismiss the Petition of Dora Miller and Harold M. Davidson for Revocation of Probate be denied, by reason of the foregoing findings and Order on the facts.

Done and Ordered at Miami, Dade County, Florida, this 31st day of December, A.D. 1946.

[Seal] /s/ W. F. BLANTON,
County Judge. [133]

12.

Thereupon, after due notice (see Item 6-B, page 34 hereof) the cause was heard on January 17, 1947, at which time the Honorable W. F. Blanton, Judge of said Court, made and entered an order appointing executor and designating depository,

Exhibit No. 3—(Continued)

recorded January 17, 1947, in Probate Orders, Book 141, page 22, the same being in words and figures following:

(Caption and Style Omitted.)

Order Appointing Executor and Designating
Depository

After due notice this cause was this day heard upon petitions and matters hereinafter specifically determined and adjudicated, and the Court having considered the same, thereupon, it is

Ordered, Considered and Determined, as follows:

1. The petition of Karin Zetterlund filed October 2, 1945, as amended on November 14, 1945, and on November 26, 1945, and each and every prayer thereof, be and the same is hereby denied. The several motions interposed by "interested persons" addressed to said petition of Karin Zetterlund, as amended, be and the same are hereby sustained.

2. It having been made manifest to the Court that Arvid Ericson, named as one of the co-executors in the Last Will and Testament of Olof Zetterlund, deceased, bearing date June 9, 1937, admitted to probate on September 6, 1945, died on September 6, 1946, and that the remaining and surviving person named in said Last Will [134] and Testament as Co-executor is qualified to act as executor. Therefore, the petition of Samuel Nelson, et al., filed on September 25, 1945, be and the same is hereby

Exhibit 3—(Continued)

granted as to Prayers (b), (c) and (d) thereof, and denied as to Prayer (a) thereof.

3. The said Samuel Nelson has this day filed in this cause his written election to avail himself of the benefits of Chapter 21980, General Acts of 1943 (Section 69.15, F.S.A., Pocket Edition), and has designated the Broward National Bank of Fort Lauderdale, Florida, a banking corporation with trust powers, organized and existing under the laws of the United States, with its principal place of business in Fort Lauderdale, Florida, as his choice of depository. Now, therefore, the Broward National Bank of Fort Lauderdale, Florida, be, and the same is hereby, designated and appointed to serve, until further order of this Court, as depository for this estate, pursuant to Chapter 21980, General Acts of 1943 (Section 69.15, F.S.A., Pocket Edition), the compensation of said depository to be determined by this Court.

4. Now, in conformity with Section 732.50, F.S.A., it is further ordered and adjudged that Samuel Nelson be, and he is hereby, appointed and constituted the sole executor of the estate of Olof Zetterlund, deceased, and that, upon the taking of the oath prescribed by law, the filing of a designation of resident agent as required by law, and the giving of a bond to be approved by the undersigned in the sum of Ten Thousand.....Dollars, letters testamentary on [135] the aforesaid estate be granted unto the said Samuel Nelson.

Exhibit 3—(Continued)

6. Upon the issuance of letters testamentary, as aforesaid, James Q. Burdet, heretofore appointed Curator, shall forthwith deliver to the said Broward National Bank of Fort Lauderdale, Florida, as depository of said estate, all monies, funds, bank deposits and intangible personal property of Olof Zetterlund, deceased. There is comprehended and embraced within the provisions of this paragraph all bank deposits of whatsoever kind of Olof Zetterlund, deceased, in bank and trust companies of whatsoever kind and wherever situated, including foreign countries, as well as the corporate stock of Olof Zetterlund, deceased, in the Halland Land Company and Elsinore Beach Corporation, together with all other intangible personal property or muniments of title thereof, which are transferable or assignable by endorsement and delivery, together with all papers and documents having an intrinsic value in themselves. In the event the Curator has not actually taken possession of the funds of Olof Zetterlund, deceased, deposited in banks or other financial institutions outside the State of Florida, he shall, in lieu of such funds on deposit, deliver to said depository all pass books, records and indicia of ownership of such bank deposits and all exchange of correspondence he may have relating thereto, all to the end that the said depository may obtain actual possession thereof. The said depository is hereby authorized to do all things [136] necessary to be done in order to cause to be transferred to it

Exhibit 3—(Continued)

all such deposits and accounts. All banks or other financial institutions be, and they are hereby, authorized and directed to deliver to said depository, upon delivery of a certified copy of this order, all funds, monies, and things of value in their custody, control or possession, belonging to Olof Zetterlund, now deceased. All other assets of Olof Zetterlund, deceased, shall be forthwith delivered by James Q. Burdet, Curator, to Samuel Nelson, Executor of said estate. The said depository and the said executor shall file in this cause a receipt of said assets, duly executed by each of them, and shall deliver an executed copy thereof to the said James Q. Burdet, Curator. The said James Q. Burdet, as Curator, shall forthwith file in this cause an inventory of all the assets of Olof Zetterlund, deceased, together with a complete accounting as Curator from the date of his appointment until the date of his delivery of the aforesaid assets, together with a complete statement of all receipts and disbursements as Curator. The matter of the compensation of James Q. Burdet as Curator and the compensation of his attorney is reserved for further adjudication.

7. Upon the issuance of letters testamentary to Samuel Nelson, as aforesaid, James Q. Burdet, the Curator, shall forthwith deliver to Samuel Nelson all records, documents, contracts, correspondence, books of account, bank statements, bank deposit books, cancelled checks, and audits of Olof

Exhibit No. 3—(Continued)

Zetterlund, now deceased, and relating to his affairs, [137] as well as all other records and papers of whatsoever kind coming into his possession, control or custody as Curator of the Estate of Olof Zetterlund, deceased; receipts therefor shall be given, and duplicates thereof filed in this Court.

8. The said Samuel Nelson is hereby authorized to withdraw from the funds and monies thus delivered to said depository the sum of \$5,000.00 and to deposit or redeposit the same in said Broward National Bank of Fort Lauderdale, Florida, as a checking account of the said executor. Said account shall be known as the Executor's checking account, and the same shall be used by said executor for legitimate purposes in the administration of said estate. Funds in said checking account may be withdrawn by the executor by checks signed by him. The said executor shall keep accurate books of account showing all disbursements of said checking account and purpose therefor.

Done and Ordered in Miami, Florida, this 17th day of January, 1947.

[Seal] /s/ W. F. BLANTON,
County Judge. [138]

18.

Thereupon, on January 20, 1947, Letters Testamentary issued to Samuel Nelson as the sole domiciliary Executor of the Estate of Olof Zetterlund,

Exhibit No. 3—(Continued)

deceased, recorded in Book of Wills No. 137, page 223, the same being in words and figures following:

(Caption and Style Omitted.)

Letters Testamentary

To All Whom These Presents Shall Come, Greeting:

Whereas, Olof Zetterlund, late of the County aforesaid, died on the 21st day of August, A.D. 1945, leaving his Last Will and Testament, which having been satisfactorily proven, was on the 6th day of September, A.D. 1945, duly admitted to probate and record in this Court. And as by said Last Will and Testament, it appears that Samuel Nelson was named therein as Executor thereof and he having prayed the Court to grant Letters Testamentary thereon to Samuel Nelson as such Executor and having, in due form of law, taken the prescribed oath, and performed all other acts necessary to his legal qualifications as such Executor.

Now, therefore, know ye, That I, W. F. Blanton County Judge in and for the County aforesaid, by virtue of the power and authority by law in me vested, do hereby declare the said Samuel Nelson duly qualified by the laws of said State to act as Executor of said Last Will and Testament with full power, by the provisions of law and by virtue of these presents, to administer all and [145] singular the goods, chattels, rights and credits, lands,

Exhibit No. 3—(Continued)

tenements and hereditaments of said Olof Zetterlund and to ask, demand, sue for, recover and receive the same; to pay the debts in which the said Olof Zetterlund stood bound, so far as the assets shall extend and the law direct, and duly entitled to have and hold for the purposes directed in and by the said Last Will and Testament, all the estate of said Olof Zetterlund during the legal continuance of his administration, until the same shall expire by virtue of the provisions of said Last Will and Testament, or until the power and authority hereby granted shall be duly revoked according to law.

In Testimony Whereof, I hereunto set my hand and affix the seal of the County Judge's Court of the County aforesaid, at Miami, Florida, this 20th day of January, A.D. 1947.

[Seal] /s/ W. F. BLANTON.

County Judge. [146]

* * *

20.

On January 28, 1947, Dora Miller and Harold M. Davidson, and the State of California, by and through its Controller, Thomas H. Kuchel, filed their notice of appeal to the Circuit Court of Dade County, Florida, with assignments of error and directions as to the record, all of which were recorded in Probate Orders, Book 141, page 161, the same being in words and figures following:

(Caption and Style Omitted.)

Exhibit No. 3—(Continued)

Notice of Appeal to Circuit Court, Assignments of Errors, and Directions as to Record

Now come Dora Miller and Harold M. Davidson, and the state of California, by and through its Controller, Thomas H. Kuchel, parties in the above-stated case, and, as appellants, enter this appeal to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, from the order of Hon. W. F. Blanton, County Judge, denying the petition of the state of California and the petition of Dora Miller and Harold M. Davidson, both petitions seeking the relief therein prayed for, including the revocation of the probate of the Will of Olof Zetterlund, and ordering that the probate proceedings continue in Dade County, Florida. Said order was entered on December 31, 1946, and this appeal is taken on January 28, 1947. [148]

Assignments of Error

Appellants assign as the errors upon which they intend to rely for the reversal of said order of the county judge the following:

(1) The Hon. W. F. Blanton, County Judge, erred in entering said order of December 31, 1946.

(2) The said county judge erred in entering said order denying the petition of the State of California, by and through its controller, seeking revocation of the probate of the will of said deceased in Dade County, Florida, and seeking the probate of said will and the codicil thereto in ancillary pro-

Exhibit No. 3—(Continued)

ceedings in Dade County, Florida, and declaring the residence and citizenship of the said Olof Zetterlund at the time of his death to have been in the State of California.

(3) Said county judge erred in entering said order denying the petition of Dora Miller and Harold M. Davidson seeking revocation of the probate of the will of said deceased in Dade County, Florida, and seeking the probate of said will and the codicil thereto in ancillary proceedings in Dade County, Florida, and declaring the residence and citizenship of the said Olof Zetterlund at the time of his death to have been in the State of California, and also seeking to have the said Dora Miller and Harold M. Davidson appointed as ancillary executors in Dade County, Florida.

Directions as to Record

The county judge is directed and requested to transmit to the Circuit Court of the Eleventh Judicial [149] Circuit in and for Dade County, Florida, the original probate file in this case, including all pleadings in this case and the original transcript of testimony taken at all the hearings, together with all exhibits introduced in evidence. Said county judge is requested to transmit said record at once.

This 28th day of January, 1947.

/s/JOHN C. SULLIVAN,

Attorney for Dora Miller and
Harold M. Davidson.

Exhibit No. 3—(Continued)

REDFEARN & FERRELL,

By /s/ D. H. REDFEARN,
Attorneys for State of
California.

State of Florida,
County of Dade.

Before me, the undersigned authority, personally appeared Eileen E. Graham, being first duly sworn, who deposes and says that she is employed in the office of Redfearn & Ferrell, attorneys for the state of California, and that, on the 28th day of January, 1947, she served a true and complete copy of the notice of appeal to the circuit court, assignments of error, and directions as to the record on the following, by mailing to each of them a true copy thereof, enclosed in an envelope bearing the requisite amount of United States uncanceled postage stamps, addressed as follows: [150]

McCune, Hiaasen, Fleming & Kelly, Attorneys at Law, Broward Bank Building, Fort Lauderdale, Florida.

Hon. Lewis H. Tribble, Legal Department, Comptroller's Office, Tallahassee, Florida.

Rasco & Esslinger, Attorneys at Law, 835 Lincoln Road, Miami Beach, Florida.

/s/ EILEEN E. GRAHAM.

Exhibit No. 3—(Continued)

Subscribed and sworn to before me, this 28th day of January, 1947.

[Seal] /s/ ZEON DOMEK,
Notary Public, State of
Florida at Large.

My Commission Expires Oct. 31, 1950. [151]

* * *

21-B.

Thereupon, at a hearing had on February 26, 1947, the Honorable W. F. Blanton, Judge of said Court, made and entered an order requiring Dora Miller and Harold M. Davidson to deliver assets, recorded February 26, 1947, in Probate Orders, Book 142, page 86, the same being in words and figures following:

(Caption and Style Omitted.)

Order Requiring Dora Miller and Harold M.
Davidson to Deliver Assets

After due notice this case was heard on February 26, 1947, upon the petition of Samuel Nelson, as executor, for an order requiring and directing Dora Miller and Harold M. Davidson to deliver to him intangible personal property in their possession owned by Olof Zetterlund, now deceased, at the time of his death, and the Court having considered said petition and the record and proceedings in this case, doth find:

On October 2, 1945, Dora Miller and Harold M.

Exhibit No. 3—(Continued)

Davidson submitted themselves to the jurisdiction of this Court by filing their joint "Petition for Revocation of Probate." In said petition, the said Dora Miller and Harold M. Davidson designated J. C. Sullivan, Attorney at Law of Miami, Florida, as their attorney of record in this cause. Said petition progressed to trial before this Court, beginning June 10, 1946, and continuing thereafter on June 11 and 14 and October 4, 1946. At said trial Dora Miller and Harold M. Davidson [164] were present in person on June 10 and 11, 1946. Said trial resulted in a decision rendered by this Court on December 31, 1946, denying said petition of Dora Miller and Harold M. Davidson, and adjudicating that Olof Zetterlund was domiciled in the State of Florida and not in California at the time of his death, and that domiciliary administration proceedings of the Estate of Olof Zetterlund should be had in Dade County, Florida, and not in Los Angeles County, California. Thereafter, on the 28th day of January, 1947, Dora Miller and Harold M. Davidson by and through their attorney, John C. Sullivan, sued out their appeal from said order rendered on December 31, 1946, which appeal is still pending. Thus it is that said Dora Miller and Harold M. Davidson, ever since October 2, 1945, have been and still are personally amenable to the jurisdiction of this Court, and that therefore this Court has the power and jurisdiction to grant the executor's petition filed February 19, 1947. It is thereupon,

Ordered, Adjudged and Considered that Dora

Exhibit No. 3—(Continued)

Miller and Harold M. Davidson be, and they are hereby, required, commanded and directed to forthwith deliver and pay, without delay, to Samuel Nelson, as Executor of the Estate of Olof Zetterlund:

(a) The sum of \$1054.53, constituting the proceeds of the bank account of Olof Zetterlund with The Greenwich Savings Bank, New York, New York, illegally and wrongfully withdrawn by Dora Miller and Harold M. Davidson on May 20, 1946, together with interest from the date of said withdrawal.

(b) The sum of \$1231.97, constituting the proceeds of the bank account of Olof Zetterlund with The Excelsior Savings [165] Bank, New York, New York, illegally and wrongfully withdrawn by Dora Miller and Harold M. Davidson on May 18, 1946, together with interest from the date of said withdrawal.

(c) The sum of \$1178.41, constituting the proceeds of the bank account of Olof Zetterlund with the East River Savings Bank, New York, New York, illegally and wrongfully withdrawn by Dora Miller and Harold M. Davidson on May 7, 1946, together with interest from the date of said withdrawal.

(d) The sum of \$2153.79, constituting the amount on deposit as of August 21, 1945, in the account of Olof Zetterlund with The Bowery Savings Bank, New York, New York, together with interest thereon from said date, illegally

Exhibit No. 3—(Continued)

and wrongfully withdrawn by Dora Miller and Harold M. Davidson on May 18, 1946.

(e) The passbook and other evidence of title to the account of Olof Zetterlund in the Dry Dock Savings Institution, Uptown Branch, New York, New York, in the amount of \$1320.85.

(f) The passbook and other evidence of title to the account of Olof Zetterlund in the Bank of America, Alhambra Branch, Alhambra, California; together with all funds withdrawn therefrom since August 20, 1945.

(g) The passbooks and other evidences of title to the account of Olof Zetterlund in each of the following banks: (Together with all funds withdrawn therefrom since August 20, 1945).

Aktiebolaget Svenska Händelsbanken,
Sweden;

Skandinaviska Banken Aktiebolag, Stockholm, Sweden.

(h) A certain mortgage note wherein Regina J. Anderson is the maker and Olof Zetterlund is the payee, bearing date August 1, 1937, in the principal amount of \$1500.00, together with the mortgage deed securing the same, encumbering Lots 7 and 8, Tract 9354, as shown by map recorded in Book 126, pages 27 and 28, of the public records of Los Angeles County, California, further described as 10320 Woodbridge Street, North Hollywood, California,

Exhibit No. 3—(Continued)

together with all interest accruing thereon. In the [166] event that the said Dora Miller and Harold M. Davidson have collected the principal and interest on said mortgage security, they shall forthwith pay to the executor all proceeds thereof, together with interest thereon from the date of their receipt thereof.

(i) The sum of \$619.43, listed as a deferred asset of Olof Zetterlund, Deceased, and particularly described as "Accrued interest receivable," in the Financial Statement lodged in this Court on March 19, 1946.

(j) The sum of \$15,400.00, listed as a deferred asset of Olof Zetterlund, Deceased, and particularly described as "Cash remitted to and withdrawn by Dora Miller," in the Financial Statement lodged in this Court on March 19, 1946.

(k) All jewelry, papers, records, personal effects and other things of value belonging to Olof Zetterlund at the time of his death and in the possession of Dora Miller and Harold M. Davidson.

This order shall be effective upon the service of a copy hereof upon John C. Sullivan, Miami, Florida, attorney of record for Dora Miller and Harold M. Davidson.

The Court reserves jurisdiction of this subject matter for the purpose of entering such further orders and writs as may be necessary to carry into effect this order.

Exhibit No. 3—(Continued)

Done and Ordered in Miami, Florida, this 26th day of February, 1947.

[Seal] /s/ W. F. BLANTON,
County Judge. [167]

* * *

22.

On May 28, 1947, the decision of the Circuit Court, being Civil Appeal No. 590, was filed with the Clerk of the Circuit Court of Dade County, recorded on June 13, 1947, in Chancery Order Book 823, page 316, the same being in words and figures following:

In the Circuit Court of the Eleventh Judicial
Circuit of Florida, in and for Dade County

Civil Appeal No. 590-1

In Re: Estate of
OLOF ZETTERLUND, Deceased.

REDFEARN & FERRELL,

Miami, Florida,

Attorneys for State of California.

McCUNE, HIAASEN, FLEMING & KELLEY,

Fort Lauderdale, Florida,

Attorneys for Samuel Nelson and Other
Interested Persons.

Exhibit No. 3—(Continued)

JOHN C. SULLIVAN, ESQ.,

Miami, Florida,

Attorney for Appellants, Dora Miller and
Harold M. Davidson.

RASCO & ESSLINGER,

Miami Beach, Florida,

Attorneys for James Q. Burdet, Curator.

On Appeal From County Judge's Court, Dade
County, Florida

* * *

On consideration of the record and briefs, and with the benefit of full argument by counsel for the [170] respective parties, this Court is of the opinion that the Order of the County Judge dated December 31, 1946, recorded in Probate Order Book 140, page 228, in the office of the County Judge, should be and it hereby is affirmed.

The decedent's long and firmly established domicile in Florida, if it was to be relinquished, afforded a wealth of opportunities for actions defining that intent, and the absence of any such definite actions on the part of the decedent is controlling. The casual oral declarations and the indirect recitals of intention to remain away, relied on to establish a change of domicile to California, made by this man who was absent for his health, and after he had become incapacitated physically and was in the process of becoming incapacitated mentally,

Exhibit No. 3—(Continued)

were lacking in quality as evidence, and were unconvincing and ineffective to create a new domicile of choice, under the circumstances presented by this record.

It is so ordered.

/s/ GEORGE E. HOLT,
Circuit Judge.

/s/ STANLEY MILLEDGE,
Circuit Judge.

/s/ CHARLES A. CARROLL,
Circuit Judge.

* * *

[Endorsed]: Filed August 26, 1947. [171]

[Title of District Court and Cause.]

ANSWER OF DORA MILLER AND HAROLD
M. DAVIDSON, INDIVIDUALLY, AND AS
CO-EXECUTORS OF THE LAST WILL
AND TESTAMENT AND CODICIL OF
OLOF ZETTERLUND, DECEASED

Comes now defendants, Dora Miller and Harold M. Davidson, as individuals and as co-executors of the Last Will and Testament and Codicil of Olof Zetterlund, deceased, and admit, deny and allege as follows:

I.

Admit that Olof Zetterlund died testate in the County of Los Angeles, State of California, on

August 21, 1945, and deny that at the time of his death Olof Zetterlund was a resident [182] and citizen of, or domiciled in Dade County, Florida, but allege the fact to be that Olof Zetterlund was, at the time of his death, and for a long time prior thereto, a resident of the County of Los Angeles, State of California, and that he was a citizen and domiciled in the County of Los Angeles, State of California, and that the residence, citizenship and domicile was adjudicated by the Superior Court of the State of California, in and for the County of Los Angeles, at the time of the death of Olof Zetterlund to be the County of Los Angeles, State of California, and deny that the County Judge's Court in and for the County of Dade, State of Florida, was a constitutional court having exclusive jurisdiction, or any jurisdiction at all, over the administration of the estate of said decedent, and that said court has never adjudicated, or determined the force and effect of a Codicil to the Last Will and Testament of Olof Zetterlund, but that the force and effect of the Codicil to the Last Will and Testament of Olof Zetterlund was adjudicated and determined by the Superior Court of the State of California, in and for the County of Los Angeles.

Admit that the County Judge's Court of Dade County, Florida, rendered a judgment adjudicating that Olof Zetterlund was domiciled in the County of Dade, State of Florida, at the time of his death, but that said decision has not become final and is now on appeal, and that said judgment does not remain in full force or effect, and that the said

court does not now have, or did have original jurisdiction in said matter.

II.

Deny that at all times subsequent to October 2, 1945, each of the defendants was personally amenable, or subject to the jurisdiction of the County Judge's Court in and for Dade County, State of Florida, but allege that they did appear for the purpose of submitting the Codicil to the Last Will and Testament of [183] Olof Zetterlund, for probate and for ancillary proceedings based on the California Court's adjudication, objecting to the probate of the Last Will and Testament, as an original proceeding in Florida, and for those purposes only, and that the said Court refused to admit the Codicil to the Last Will and Testament of Olof Zetterlund to probate, although the Court of proper jurisdiction, to wit: The Superior Court of the State of California, in and for the County of Los Angeles, had admitted said Codicil to probate and adjudicated, prior to the hearing in said court in Florida, that said Codicil was properly executed and was the last will and testament of Olof Zetterlund; that there is a conflict existing between said court in California and said court in Florida.

That these defendants deny that the judgment of the Florida Court is a final judgment.

III.

Deny that the judgment of the Florida Court referred to in Paragraphs 4, 5 and 6 of plaintiff's first claim is one to which this Court, or the Courts

of California, must give full faith or credit under the provisions of Section 1, Article IV, of the Constitution of the United States, and allege that all intangible and tangible personal property of Olof Letterlund, deceased, is subject to the jurisdiction of the State of California Superior Court, in and for the County of Los Angeles, and that the County Judge's Court in and for Dade County, Florida, has no jurisdiction whatsoever over any tangible or intangible personal property of said Olof Zetterlund, deceased. Denies generally and specifically each and every other allegation of paragraphs 4, 5, and 6.

Wherefore, defendants pray that the judgment of February 26, 1947, be adjudicated by this Court to be of no force and effect and unenforceable, and that it be denied a judgment of this Court, and that the Court adjudicate and adjudge that the Superior Court of the State of California, in and for the County of Los [184] Angeles, has the sole jurisdiction of tangible and intangible personal property of Olof Zetterlund, deceased, and that the defendants be given judgment with costs, and for such other and further relief as may be proper.

And in Answer to Plaintiff's Second Claim, defendants admit, deny and allege as follows:

I.

Deny that at the time of his death, Olof Zetterlund was a resident, or citizen of the State of Florida, but allege that said Olof Zetterlund was

at the time of his death, and for a long time prior thereto, a resident and citizen of the State of California, and was domiciled and a resident of the County of Los Angeles, California.

II.

Deny that Dora Miller completely, or at all, dominated or controlled the activities of Olof Zetterlund; deny that during the fall of 1941, or at any other time, or at all, or when Olof Zetterlund was infirm, or ill, or senile, or aged, or physically or mentally incapacitated, defendant Dora Miller persuaded Olof Zetterlund to go to the State of California for a short visit on account of his health, but allege the fact to be that in the fall of 1941 Olof Zetterlund was of sound mind and memory and that he decided to go to California of his own will and volition for his health and that he decided Florida was not a healthful state, but that California was a healthful state and that the climatic conditions in California were very superior to that of Florida for the health of Olof Zetterlund.

Admit that Olof Zetterlund and defendant Dora Miller arrived in California in the fall of 1941, but deny that the condition of Olof Zetterlund became progressively worse, but allege that his condition became generally better; and deny that he [185] lost his power of locomotion, or his power of speech, or his ability to write or read, and deny that in 1942, or at any other time, Dora Miller, through artifice, or any other means, or otherwise, gained complete, or exclusive possession, or control of the

funds, or bank accounts of Olof Zetterlund, but allege that she was employed by Olof Zetterlund as his secretary and assistant and did assist him in all of his business dealings.

Deny generally and specifically each and every allegation contained in Paragraph 4 of plaintiff's second claim and deny that there were any sums in excess of \$10,000.00 in any of the banks set forth therein, or states, and deny that any of the funds at all were dissipated by Dora Miller, but allege that any funds that were withdrawn, or used, were withdrawn and used for the benefit and use of Olof Zetterlund, and for no one else, and were withdrawn at his specific instance and request and demand, and that no funds were withdrawn by Dora Miller except upon the request of Olof Zetterlund.

III.

Deny that during the latter part of 1943 Dora Miller, with the cooperation, or assistance, or advice of defendant, Harold M. Davidson, or any one else, or at all, undertook to acquire real or personal property in the name of Dora Miller, or with funds belonging to Olof Zetterlund, or the execution of any plan at all which Dora Miller caused to be procured, or delivered, or recorded a grant deed set forth in plaintiff's second claim, and marked Exhibit 4 of plaintiff's complaint, but allege the fact to be that Olof Zetterlund, for and in consideration of services rendered to Olof Zetterlund by Dora Miller, purchased and paid for said real property and that the money did come from Olof Zetter-

lund and was voluntarily and without coercion at all, given to Dora Miller for the purpose of permitting Olof Zetterlund to have a home during the remainder of his life and with the express understanding that it was her sole property and that Olof Zetterlund had no interest therein except the [186] right to use it during his lifetime.

Deny that Dora Miller elaborately furnished said dwelling, but allege that the furniture is common and ordinary furniture and furnishings and were furnished to Dora Miller by Olof Zetterlund at his own request.

IV.

Deny generally and specifically each and every allegation contained in Paragraph 6 of plaintiff's second claim and in this connection allege that any funds that were withdrawn from any bank at all were drawn at the request of Olof Zetterlund and at his special instance and request and for his use and benefit and not for the use or benefit of Dora Miller, except for the payment to her of wages.

V.

Deny generally and specifically each and every allegation contained in Paragraphs 7 and 8 of plaintiff's second claim and deny that Dora Miller wrongfully or illegally or fraudulently claims title, or ownership, to said property, or is now undertaking to sell, or dispose of the same, or appropriate the funds and proceeds thereof, and deny that the property was purchased for any sum in excess of \$13,000.00, and Dora Miller alleges that

said property is her sole property and that the plaintiffs, or the estate of Olof Zetterlund, have no interest in said real or personal property. That the real property and the personal property were each chosen personally by Olof Zetterlund and that, at his direction, the title was placed in the name of Dora Miller in consideration of her tender care and services to him, and for the purpose of providing her with security and for a place in which he might make his home during the remainder of his lifetime.

Wherefore, defendants pray that judgment be given to these defendants in said second claim and that plaintiff take nothing by his second claim at all, and that the Court adjudge and decree [187] that plaintiff has no right, title or interest whatsoever in and to the real property described in said second claim, and for such other and further relief as may be proper.

And in Answer to Plaintiff's Third Claim, defendants admit, deny and allege as follows:

I.

Answering Paragraph 2, deny that at the time of his death, Olof Zetterlund was a resident or citizen of the state of Florida, but allege that at that time, he was a resident of, and domiciled in the state of California.

II.

Answering Paragraph 3, deny that throughout the last years of the life of Olof Zetterlund defend-

ant Dora Miller completely dominated or controlled his activities, but allege that at all times Dora Miller explicitly followed the directions given her by Olof Zetterlund.

III.

Deny generally and specifically each and every allegation contained in Paragraph 4 of plaintiff's second claim as incorporated in plaintiff's third claim and deny that accounts aggregating \$100,000.00, or any other sums at all, were dissipated by Dora Miller at any time, place, or in any manner whatsoever.

IV.

Deny generally and specifically each and every allegation contained in Paragraph 5 of plaintiff's said third claim, and deny that any funds at all were at any time diverted to her own use or that she had any dominion or control over the affairs of Olof Zetterlund, but acted only under his direction, and in this connection, defendants allege that Harold M. Davidson did not know Olof Zetterlund, or Dora Miller, until he was called upon in the early part of 1944. [188]

Wherefore, defendants pray that plaintiff take nothing by his third claim and that they be given judgment with costs.

And in Answer to the Fourth Claim in plaintiff's complaint, defendants admit, deny and allege as follows:

I.

Answering Paragraph 2, deny that at the time of

his death Olof Zetterlund was a resident or citizen of, or domiciled in Dade County, Florida, but allege the fact to be that he was a resident of, and domiciled in the County of Los Angeles, State of California, and that his estate is subject to the jurisdiction of the State of California and not of the State of Florida.

II.

Answering Paragraph 3, deny generally and specifically each and every allegation contained in Paragraph 3 of plaintiff's first claim which was incorporated by reference in said fourth claim.

III.

Deny generally and specifically each and every allegation contained in Paragraph 4 of plaintiff's fourth claim and specifically deny that the County Judge's Court in and for Dade County, Florida, had exclusive jurisdiction or any jurisdiction whatsoever over the estate of Olof Zetterlund, and allege that the said County Judge's Court refused to pass upon the purported Codicil, or recognize it at all and that said Court was prejudiced against the California Court and that said judgment set forth in Paragraph 4 of plaintiff's fourth claim in said complaint has not become final, and further allege that the Superior Court of the State of California, in and for the County of Los Angeles, has the sole and exclusive jurisdiction over all of the tangible and intangible property of Olof Zetterlund, deceased, and allege that all of the acts performed by these defendants were done with the express

authority of the Superior Court of the State of California, in and for the [189] County of Los Angeles, and that plaintiff has no right, or jurisdiction, to interfere with the orders of the said Superior Court of the State of California, and that the plaintiff is endeavoring to interfere with the orders of said Court of the State of California.

IV.

Answering Paragraph 5, admit that the defendants claim and hold themselves out to be co-executors of the Estate of Olof Zetterlund, deceased, and admit that they are exercising the powers of said office as conferred and granted to them by the Superior Court of the State of California, in and for the County of Los Angeles. Deny generally and specifically each and every allegation in said paragraph not herein specifically admitted. Deny that they have unlawfully, wrongfully or fraudulently appropriated to themselves a large amount of the funds belonging to the Estate of Olof Zetterlund in the sum of \$3,000.00 exclusive of interest and costs, or any other sum or at all, and allege that any sum taken into the hands of the defendants was as co-executors of the Estate of Olof Zetterlund, by and with the authority given them by the Superior Court of the State of California, in and for the County of Los Angeles.

Wherefore, defendants pray that plaintiff take nothing by his fourth cause of action and claim, and that the Court adjudicate and adjudge that he has no right or cause to interfere with the defend-

ants in the operation and management of the Estate of Olof Zetterlund, deceased, in the State of California, and concerning any tangible or intangible property of said decedent, and that it further adjudge that the plaintiff has only the right to exercise jurisdiction over real property that may exist in the State of Florida; for costs of suit; and for such further order as may be just and proper in the premises.

/s/ WILLIAM J. CLARK,

Attorney for Defendants. [190]

State of California,
County of Los Angeles—ss.

Dora Miller and Harold M. Davidson, being by me first duly sworn, depose and say: That they are defendants in the foregoing and above-entitled action; that they have read the foregoing Answer and know the contents thereof; and that the same is true of their own knowledge, except as to the matters which are therein stated upon their information or belief, and as to those matters that they believe it to be true.

/s/ DORA MILLER,

/s/ HAROLD M. DAVIDSON.

Subscribed and sworn to before me this 30th day of September, 1947.

[Seal] /s/ INEZ DEEMS,
Notary Public in and for
Said County and State.

My Commission expires Feb. 1, 1949.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 1, 1947.

[Exemplified copy of Opinion of Supreme Court of Florida affirming Judgment in lower court reported in 35 So. (2d) 288. Filed herein on June 23, 1948, and is not reprinted here.]

MANDATE FROM SUPREME COURT

The State of Florida

To the Honorable the Judge of the Circuit Court
for the Eleventh Judicial Circuit of Florida:

Greeting:

Whereas, Lately in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for the County of Dade, in a cause wherein

In Re: Estate of Olof Zetterlund, Deceased, Dora Miller and Harold M. Davidson, and the State of California, were Appellants, and Samuel Nelson, Executor of the Estate of Olof Zetterlund, Deceased, and other interested heirs, were Appellees, the Judgment of said Circuit Court was rendered May 29, 1947, as by the inspection of the transcript of the record of the said Circuit Court which was brought into the Supreme Court of the State of Florida, by virtue of an appeal agreeably to the laws of said State in such case made and provided, fully and at large appears:

And Whereas, at the January Term of said Supreme Court holden at Tallahassee, A.D. 1948, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel; in consideration whereof, on the 30th day of April, A.D. 1948, it was considered by said Supreme Court that the said Judgment of the Circuit Court be and the same is hereby affirmed; it is further ordered by the

Court that the Appellees do have and recover of and from the Appellants their costs by them in this behalf expended, which costs are taxed at the sum of Dollars; therefore,

You Are Hereby Commanded, That such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme Court, and the laws of the State of Florida, ought to be had, the said Judgment of the Circuit Court notwithstanding.

Witness, The Honorable Elwyn Thomas, Chief Justice of said Supreme Court, and the seal of said Court at Tallahassee, this 29th day of May, 1948.

GUYTE P. McCORD,
Clerk, Supreme Court of
Florida.

A True Copy.

Test:

GUYTE P. McCORD,
Clerk, Supreme Court.

[Endorsed]: Filed June 23, 1948. [239]

In the District Court of the United States in
and for the Southern District of California,
Central Division

Civil No. 7545-HW

SAMUEL NELSON, Individually, and as an Heir,
Devisee and Legatee of Olof Zetterlund, De-
ceased, Suing on His Own Behalf and on
Behalf of All Other Heirs, Devisees and Lega-
tees of Olof Zetterlund, Deceased, Similarly
Situated, etc.,

Plaintiff and Cross-Defendant,

vs.

DORA MILLER and HAROLD M. DAVIDSON,
Both Individually and as Pretending Co-Execu-
tors, or Co-Executors De Son Tort, of the
Estate of Olof Zetterlund, Deceased,

Defendants and Cross-Complainants.

DORA MILLER and HAROLD M. DAVIDSON,
Co-executors of the Estate of Olof Zetterlund,
Deceased,

Cross-Complainants and
Complainants in Interpleader,

vs.

STATE OF CALIFORNIA and THOMAS H.
KUCHEL, as Controller of the State of Cali-
fornia,

Defendants in Interpleader.

JUDGMENT

The above-entitled matter came on regularly to
be heard April 5th, 1951, before the above-entitled

Court, Honorable Harry C. Westover, District Judge, Presiding; the plaintiff and cross-defendant Samuel Nelson individually and as an heir, devisee and legatee of Olof Zetterlund, deceased, appearing by his attorney, Edward O'Connor, of the firm of O'Connor & O'Connor, and defendants and cross-complainants Dora Miller and Harold M. Davidson, both individually and as co-executors of the Estate of Olof Zetterlund, deceased, appearing in person and through counsel, William J. Clark, and the State of California, and Thomas H. Kuchel, as Controller of the State of California, appearing through its attorney, Morton L. Barker, and the cause having been submitted to the Court for decision, based upon certain facts admitted by the parties in the matter, and with the request that the Court determine whether or not it could render a judgment based upon the admitted facts, before taking any evidence beyond the question as to whether or not the Federal Court could adjudicate the rights or responsibilities of the two sets of Executors, one appointed in the Probate Court of the State of Florida, and one appointed by the Probate Court of the State of California, and the matter having been submitted to the Court for its decision, and the Court having signed and filed its Findings of Fact and Conclusions of Law, and plaintiff having in open Court requested its second cause of action be dismissed,

It Is Ordered, Adjudged and Decreed that plaintiff, Samuel Nelson, individually and on behalf of all other heirs, devisees and legatees of Olof Zetterlund, deceased, and as Executor of the Estate of

Olof Zetterlund, in the State of Florida, and as Trustee of an expressed trust, take nothing by his complaint, or in any of his causes of action, and that the defendants Dora Miller and Harold M. Davidson, individually and as co-executors of the Estate of Olof Zetterlund, deceased, in California, be [263] given judgment on plaintiff's first, third and fourth causes of action, and the second cause of action is dismissed.

It Is Further Ordered, Adjudged and Decreed that the cross-complainants take nothing by their cross-complaint and that this Court will not interfere with the probate proceedings and judgments of the Probate Courts of California or Florida or adjudicate the residence of Olof Zetterlund, at the time of his death.

Dated July 2, 1951.

/s/ HARRY C. WESTOVER,
Judge.

Approved as to Form:

/s/ EDWARD J. O'CONNOR,
Attorney for Plaintiff and
Cross-Defendant.

/s/ WILLIAM J. CLARK,
Attorney for Defendants
and Cross-Complainants.

/s/ MORTON L. BARKER,
Attorney for State of California and Thomas H.
Kuchel, Defendants in Interpleader.

[Endorsed]: Filed July 3, 1951.

Entered July 3, 1951. [264]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS UNDER RULE 73 (B)

Notice is hereby given that Samuel Nelson, individually, and as an heir, devisee and legatee of Olof Zetterlund, deceased, suing on his own behalf and on behalf of all other heirs, devisees and legatees of Olof Zetterlund, deceased, plaintiff and cross-defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on July 3, 1951.

O'CONNOR & O'CONNOR,

By /s/ EDWARD J. O'CONNOR,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 2, 1951. [265]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 271, inclusive, contain the original Complaint; Answer; Cross-Complaint; Exemplified Copy of Decision of Supreme Court of Florida, Miller and Davidson, et al., vs. Nelson, etc.; Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Record on Appeal and Motion for and Order Extending Time to Docket Appeal, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 21st day of September, A.D. 1951.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13110. United States Court of Appeals for the Ninth Circuit. Samuel Nelson, Individually and as an Heir, Devisee and Legatee of Olof Zetterlund, Deceased, Suing on His Own Behalf and on Behalf of All Other Heirs, Devisees and Legatees of Olof Zetterlund, Deceased, Similarly Situated, Appellant, vs. Dora Miller and Harold M. Davidson, Both Individually and as Pretending Co-Executors, or Co-Executors De Son Tort, of the Estate of Olof Zetterlund, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 24, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13110

SAMUEL NELSON, Individually, and as an Heir,
Devisee and Legatee of Olof Zetterlund, De-
ceased, Suing on His Own Behalf and on
Behalf of All Other Heirs, Devisees and Lega-
tees of Olof Zetterlund, Deceased, Similarly
Situated, etc.,

Appellant,

vs.

DORA MILLER and HAROLD M. DAVIDSON,
Both Individually and as Pretending Co-Execu-
tors, or Co-Executors De Son Tort, of the
Estate of Olof Zetterlund, Deceased,

Appellees.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Comes Now the Appellant in the above-entitled case and files the following statement of points relied upon by the Appellant for reversal of the judgment entered in said cause by the United States District Court for the Southern District of California, Central Division, on the 3rd day of July, 1951, and designation of parts of the record which appellant thinks necessary for the consideration of said points.

Points relied upon for reversal of judgment:

1. That the Court erred in not giving full faith and credit to a judgment entered by the County Court Judge of Dade County, State of Florida, which judgment was affirmed by the Circuit Court of Appeals of the State of Florida, and which judgment was again affirmed by the Supreme Court of the State of Florida.

2. That the Court erred in refusing to enter a judgment directing the appellees to perform and satisfy each of the provisions of the judgment of the Florida Court.

* * *

Dated this 6th day of November, 1951.

O'CONNOR & O'CONNOR,

By /s/ EDWARD J. O'CONNOR,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 7, 1951.

United States
Court of Appeals
for the Ninth Circuit.

SAMUEL NELSON, Individually, and as an Heir,
Devisee and Legatee of Olof Zetterlund, De-
ceased, Suing on His Own Behalf and on
Behalf of All Other Heirs, Devisees and Lega-
tees of Olof Zetterlund, Deceased, Similarly
Situated,

Appellant,

vs.

DORA MILLER and HAROLD M. DAVIDSON,
Both Individually and as Pretending Co-
Executors, or Co-Executors De Son Tort, of the
Estate of Olof Zetterlund,

Appellees.

Supplemental
Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

United States
Court of Appeals
for the Ninth Circuit.

SAMUEL NELSON, Individually, and as an Heir,
Devisee and Legatee of Olof Zetterlund, De-
ceased, Suing on His Own Behalf and on
Behalf of All Other Heirs, Devisees and Lega-
tees of Olof Zetterlund, Deceased, Similarly
Situated,

Appellant,

vs.

DORA MILLER and HAROLD M. DAVIDSON,
Both Individually and as Pretending Co-
Executors, or Co-Executors De Son Tort, of the
Estate of Olof Zetterlund,

Appellees.

Supplemental
Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil No. 7545-B

DORA MILLER and HAROLD M. DAVIDSON,
as Co-executors of the Estate of Olof Zetter-
lund, Deceased,

Cross-Complainants,

vs.

SAMUEL NELSON, Individually, and as an Heir,
Devisee and Legatee of Olof Zetterlund, De-
ceased, and as Pretending Executor, or Ex-
ecutor de son tort of the Estate of Olof Zetter-
lund, Deceased,

Cross-Defendant.

CROSS-COMPLAINT FOR DECLARATORY RELIEF

The Cross-complainants bring this cross-complaint as Co-executors of the Estate of Olof Zetterlund, deceased, by and through their Attorney, William J. Clark, 317 West Main Street, Alhambra, California, and bring this action against Samuel Nelson, individually, and as the pretending executor of the Estate of Olof Zetterlund, deceased. Cross-complainants are adults and are residents and citizens of the County of Los Angeles, State of California. The Cross-defendant is an adult and a resident of Essex County, State of New Jersey.

The matter in controversy is of a civil nature

and [194*] exceeds, exclusive of interest and costs, the sum of \$3,000.00.

Cross-complainants complaint and allege:

I.

That Olof Zetterlund died on the 21st day of August, 1945, and that at the time of his death, and for a long time prior thereto, was a resident of the County of Los Angeles, State of California, and was domiciled in the County of Los Angeles, State of California.

II.

That on August 31, 1945 Cross-complainants filed a petition to probate the Codicil of the Will of Olof Zetterlund in the Superior Court of the State of California, in and for the County of Los Angeles. That thereafter, on September 7, 1945, by order of the Superior Court in said proceeding, Harold M. Davidson was appointed Special Administrator of the Estate of Olof Zetterlund, deceased, and was ordered by said Court to proceed to Dade County, Florida, and to perform such acts necessary to carry on the business of Olof Zetterlund, deceased, and to take possession of all real and personal property belonging to said estate and to preserve it from damage, waste and injury. That on September 7, 1945 Special Letters of Administration were issued to Harold M. Davidson.

That on September 28, 1945 the said Superior Court made its order admitting the Codicil to the

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Last Will and Testament of Olof Zetterlund, deceased, and appointed Dora Miller and Harold M. Davidson as co-executors of said estate. That on September 28, 1945 Letters Testamentary were issued by said Court to these Cross-complainants.

That on November 15, 1945, the said Superior Court issued [195] a supplemental order admitting to probate the Last Will and Testament of Olof Zetterlund, deceased, together with said Codicil, and that an exemplified copy of all of said orders and petitions, as here above set forth, are attached hereto and marked Exhibit "A" and made a part of this cross-complaint as if set forth herein in full.

III.

That cross-complainants filed a petition for probate of codicil to the will of Olof Zetterlund, in Dade County, Florida, and a petition for ancillary proceeding and submitted exemplified copies of the probate of the codicil and the will of Olof Zetterlund as admitted to probate in the Superior Court of the State of California in and for the County of Los Angeles. That said codicil was duly signed by the testator and witnessed by two witnesses in accordance with the California law. That the Dade County Florida Court denied the petition to admit the codicil to probate and denied the petition for ancillary proceedings in Florida.

IV.

That cross-defendant claims that he is the executor of the estate of Olof Zetterlund, deceased, and

that Olof Zetterlund was a resident of Dade County, Florida, and that the County Judge's Court in and for Dade County, Florida, had exclusive jurisdiction over the administration of the estate of said decedent.

V.

That a controversy has arisen between cross-complainants and cross-defendant in that each claim to have exclusive jurisdiction over the tangible and intangible property of said Olof Zetterlund, deceased, and each claims a difference in the residence of Olof Zetterlund at the time of his death, and cross-complainants contend that the Superior Court of the State of California, in and for the County of Los Angeles, has exclusive jurisdiction over said estate, and cross-defendant contends that the County Judge's Court in and for Dade County, Florida, has exclusive jurisdiction and [196] that said controversy cannot be settled and determined except by adjudication by this Court.

Wherefore, cross-complainants pray that this Court adjudge and decree that Olof Zetterlund was a resident of Los Angeles County, State of California, at the time of his death and was domiciled in the State of California at the time of his death, and that the Superior Court of the State of California, in and for the County of Los Angeles, has full, complete and exclusive jurisdiction over all of the tangible and intangible assets of the estate of Olof Zetterlund, deceased, and that cross-complainants are the true and lawful co-executors of the Last Will and Testament and Codicil of Olof Zetterlund, deceased, and

for such other and further orders and decrees that may be necessary to adjudicate and declare the respective rights of the parties.

WILLIAM J. CLARK,

/s/ WILLIAM J. CLARK,

Attorney for Cross-

Complainants. [197]

State of California,

County of Los Angeles—ss.

Dora Miller and Harold M. Davidson, each being by me first duly sworn, depose and say:

That they are the Cross-complainants in the above-entitled action; that they have each read the foregoing Cross-Complaint and know the contents thereof; and that the same is true of their own knowledge, except as to the matters which are therein stated upon their information or belief, and as to those matters that they believe the same to be true.

/s/ DORA MILLER,

/s/ HAROLD M. DAVIDSON.

Subscribed and sworn to before me this 30th day of September, 1947.

[Seal] /s/ INEZ DEEMS,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires: February 1, 1949. [198]

EXHIBIT A

Notice!

Please Attach Copy of Will to the Petition

Date of Hearing: September 28, 9:30 a. m.

Harold M. Davidson, Attorney for Petitioner;

219 Professional Building,

317 West Main Street,

Alhambra, California,

ATlantic 2-6138—CUMberland 3-1511.

In the Superior Court of the State of California in
and for the County of Los Angeles

Case No. 246,797

In the Matter of the Estate of
OLOF ZETTERLUND,

Deceased.

PETITION FOR PROBATE
CODICIL TO WILL

To the Superior Court of the County of Los Angeles,
State of California:

The petition of Dora Miller and Harold M. Davidson of the County of Los Angeles, State of California, respectfully states:

1. That Olof Zetterlund died on or about the 21st day of August, 1945, at San Gabriel, California.

2. That said deceased at the time of his death was a resident of the County of Los Angeles, State of California, and left property in the County of Los Angeles, State of California.

3. That the character and estimated value of the property of said estate, and the probable annual income therefrom, so far as known to your petitioner, are as follows:

Bank accounts, stock in a Florida corporation, and mortgages, \$850,000.00.

Annual income estimated at \$22,700.00. [199]

4. That said deceased left a Will bearing date the 9th day of June, 1937, and a codicil to said Will dated August 3, 1945, which your petitioners allege to be the last Will of said deceased, and which is presented herewith; that a copy of said will is annexed to this petition, marked exhibit "A."

5. That Dora Miller and Harold M. Davidson named in said Will as co-executors thereof, consent to act as such co-executors.

6. That the names, ages and residences of the devisees and legatees named in the said Will of deceased are as follows:

See Attached Schedule.

7. That the names, ages and residences of the heirs at law of said deceased, so far as known to your petitioner, are as follows:

See Attached Schedule. [200]

8. That at the time said Will was executed, to wit, on the said 9th day of June, 1937, the testator was over the age of eighteen years, to wit, of the age of...years, or thereabouts, and was of sound and disposing mind, and not acting under duress,

menace, fraud, or undue influence, and was in every respect, competent, by last Will, to dispose of all his estate.

9. *That said Will is in writing signed by the said testator and attested by two subscribing witnesses. Your petitioners allege that said testator acknowledged the Will in the presence of said witnesses, present at the same time, and that said witnesses signed the said Will at the request of said testator and in the presence of said testator, and your petitioners further allege that said witnesses, at the time of attesting the execution of said Will, were competent.

(*If an holograph will, so state and strike out paragraph 9.)

Wherefore, your petitioners pray that the said Will may be admitted to probate, and that Letters (Insert: "Testamentary," if for executor named in will, otherwise "of Administration with-the-will-annexed.") Testamentary be issued to your petitioners, and that for that purpose a time be appointed for proving said Will and that due notice thereof be given according to law, and that all necessary and proper orders may be made in the premises.

Dated August 24, 1945.

/s/ DORA MILLER,

/s/ HAROLD M. DAVIDSON. [209]

6. That the names, ages and residences of the devisees and legatees named in the said Will of deceased are as follows:

Karen Zetterlund, sister, 1454 Berwyn Avenue, Chicago, Illinois.

Carl Zetterlund, brother, deceased.

Gustaf Zetterlund, brother, deceased.

Augusta Zetterlund, niece, Arvika, Sweden.

Theodore Zetterlund, nephew, Milwaukee, Wis.

Dora Miller, stranger, 525 N. Del Mar Avenue, San Gabriel, Calif.

Mrs. Ellen Burdet, stranger, 528 Collins Avenue, Miami Beach, Fla.

Britta Zetterlund, sister, deceased.

Johannes Zetterlund, brother, deceased.

Hulda Zetterlund, niece, Kollstad, Sweden.

Gunard Zetterlund, nephew, Arvika, Sweden.

Inga Zetterlund, niece, Arvika, Sweden.

Albert Zetterlund, nephew.

Hulda.

David Zetterlund, nephew.

Signe.

Gustaf Zetterlund, nephew.

Carl Zetterlund, nephew.

Ruth.

Naime.

Hanna.

Sara.

Gustaf Zetterlund, nephew.

Enfrid Zetterlund, nephew.

Samuel.

Paul.

Hanna.

Ester.

Lydia.

Constance. [201]

Hulda.

Maria.

Paul Zetterlund, nephew.

John Zetterlund, nephew.

7. That the names, ages and residences of the heirs at law of said deceased, so far as known to your practitioners, are as follows:

Karen Zetterlund, sister, 1454 Berwyn Avenue, Chicago, Illinois.

Augusta Zetterlund, niece, Arvika, Sweden.

Theodore Zetterlund, nephew, Milwaukee Wis.

Hulda Zetterlund, niece, Kollstad, Sweden.

Gunard Zetterlund, nephew, Arvika, Sweden.

Inga Zetterlund, niece, Arvika, Sweden.

Albert Zetterlund, nephew.

Hulda.

David Zetterlund, nephew.

Signe.

Gustaf Zetterlund, nephew.

Carl Zetterlund, nephew.

Ruth.

Naime.

Hanna.

Sara.

Gustaf Zetterlund, nephew.

Enfrid Zetterlund, nephew.

Samuel.

Paul.

Hanna.

Ester.

Lydia.

Constance.

Hulda.

Maria.

Paul Zetterlund, nephew.

John Zetterlund, nephew. [202]

I, Olof Zetterlund, a citizen of Dade County, Florida, being of sound mind and memory, do hereby make, publish, and declare this my Last will and testament, hereby revoking and annulling all former wills by me made, in manner following, that is to say:

First: I desire that my executors hereinafter named, shall pay out of my estate all my just debts and funeral expenses without delay after my decease.

Second: I give and bequeath to my brother Carl, brother Gustaf, and sister Karin of Chicago, all my household goods, jewelry, library, personal clothing, and automobile, etc., to use, distribute or sell, according to their pleasure.

Third: I give and bequeath to each of my brother Carl, brother Gustaf, and sister Karin, Two Thousand Dollars (\$2,000.00) to each of them.

Fourth: I give and bequeath to my faithful

housekeeper, Miss Dora Miller, Nine Thousand Dollars (\$9,000.00).

Fifth: I give and bequeath to Mrs. Ellen Burdet, cashier in my hotel, for faithful service, Nine Thousand Dollars (\$9,000.00).

Sixth: I give and bequeath to my niece, Augusta Zetterlund, of Arvika, Sweden, Five Hundred Dollars (\$500.00).

Seventh: I give and bequeath to Theodore Zetterlund of Milwaukee, United States, Five Hundred Dollars (\$500.00).

Eighth: I give and bequeath to my sister, Britta, Arvika, Sweden, One Thousand Dollars (\$1,000.00).

Ninth: I give and bequeath to my brother Johannes, Amotfors, Sweden, One Thousand Dollars (\$1,000.00).

Tenth: I give and bequeath to my niece, Hulda Zetterlund, Kollstad, Sweden, Five Hundred Dollars (\$500.00). [203]

Eleventh: I give and bequeath to my nephew Gunard Zetterlund, Arvika, Sweden, One Thousand Dollars (\$1,000.00).

Twelfth: I give and bequeath to my niece Inga Zetterlund, Arvika, Sweden, One Thousand Dollars (\$1,000.00).

Thirteenth: All the rest of my estate, such as real estate, residence, and remainder of my personal estate, goods and chattels of whatever nature or kind it may be, and after monies realized from the same, except what is already disposed of and described above under this will, shall be divided into

twenty-seven (27) parts and I give and bequeath one part of the twenty-seven (27) parts to each of my relatives described as follows:

Fourteenth: I give and bequeath to my sister Britta and brother Johannes one part of the twenty-seven (27) parts to each of them. In the event of that anyone of them shall die before I am deceased their children shall inherit their share.

Fifteenth: I give and bequeath to my brother Carl, brother Gustaf, and sister Karin one part of the twenty-seven (27) parts to each of them.

Sixteenth: I give and bequeath to my brother Johannes' children, namely, Albert, David, Hulda, Signe, Gustaf and Carl one part of the twenty-seven (27) parts to each of them.

Seventeenth: I give and bequeath to my sister Britta's children, namely, Ruth, Naime, Hanna, Sara, Gustaf and Enfrid one part of the twenty-seven (27) parts to each of them.

Eighteenth: I give and bequeath to my sister Kajsa's children (Kajsa is now deceased) namely, Samuel, Paul, Hanna, Ester, Lydia and Constance one part of the twenty-seven (27) parts to each of them.

Nineteenth: I give and bequeath to my brother Eric's Children (Eric is now deceased) namely, Hulda, Maria, Paul and John, one part of the twenty-seven (27) parts to each of them.

Twentieth: At the present my estate consists principally [204] of land and improved real estate and a hotel, and it is my desire that the executors of my last Will and Testament shall not sacrifice too

much of its value in order to convert the same into money.

Twenty-First: Lastly: I hereby nominate, constitute and appoint my nephew Samuel Nelson of Maplewood, New Jersey; and Arvid Ericson of Toledo, Ohio, the executors of this, my last will and testament, hereby revoking all former wills by me made.

Twenty-Second: I know that there will be a great deal of work in connection with a proper execution of this will; I therefore give and bequeath to Samuel Nelson and Arvid Ericson One Thousand Dollars (\$1,000.00), to each of them as compensation for their work and good judgment in connection herewith.

Twenty-Third: If any one of my heirs resorts to the Courts to break the provision of this will, the bequests to such heirs will be revoked by said act, and the said heir's portion will go into my estate to be divided among the other legatees.

Twenty-Fourth: If any one of my heirs, except sister Britta, sister Karin, brother Johannes, brother Carl and brother Gustaf, who have been bequeathed one part of the twenty-seven (27) parts, as described in this my last will, should die before I am deceased, his or her part of the twenty-seven (27) parts will go to the general fund and be inherited, pro rata, by all the remaining heirs.

In Witness Whereof I have herein set my hand and seal this 9th day of June in the year of 1937.

OLOF ZETTERLUND.

The above instrument was, at the date thereof, signed, sealed, published and declared, by the said Olof Zetterlund, as and for his last will and testament in presence of us, who, at his request, and in his presence, and in the presence of each others, have subscribed our names as witness thereof.

E. L. LOCKHART,

P. A. WILLIAMS. [205]

Codicil to Last Will and Testament of
Olof Zetterlund

I, Olof Zetterlund, a citizen of the City of San Gabriel County of Los Angeles, State of California, being of sound mind and memory, do hereby declare this to be a Codicil to my last will and testament, made and executed by me on the 9th day of June, 1937, in the following manner:

First: I hereby reaffirm and reallege each and every allegation and paragraph in my former Will, except Paragraph 21 and Paragraph 22 thereof. Inasmuch as I am now a resident of the County of Los Angeles, State of California, I wish to nominate and appoint local co-executors. I hereby delete Paragraph 21 from my former Will, and in place thereof make a new Paragraph 21, reading as follows:

Lastly, inasmuch as I am now a resident of Los Angeles County, California, I hereby nominate, constitute and appoint Dora Miller of San Gabriel, California, and Harold M. Davidson, of Alhambra,

California, as co-executors of my Last Will and Testament, and direct and authorize that they serve without bond, and it is my desire that the co-executors shall not sacrifice too much of the value of my estate unless in their opinion, it shall be absolutely necessary to do so in order to properly probate my Will.

Second: I hereby delete from my former Will, Paragraph 22 wherein I gave and bequeathed to Samuel Nelson and Arvid Ericson, whom I had named as executors of that Will, \$1,000.00 each for their work as executors. It is my intention and desire that the newly named and appointed co-executors, Dora Miller and Harold M. Davidson, shall only receive as remuneration for their services as my co-executors, such sum as the State of California provides shall be paid to the co-executors of my Last Will and Testament, and said sum paid for the services of co-executors shall be that [206] set forth in the California I. statutes.

Third: I wish to add one additional paragraph to my Will, being Paragraph 25, reading as follows:

If any person or persons other than those named in this document shall prove themselves to be my legal heir and entitled to take any portion of my estate, to such person or persons, individually, I give the sum of One Dollar (\$1.00) only.

Fourth: No other portion or paragraph of my Will is changed or altered in any manner whatsoever, except as herein set forth as to Paragraph Twenty-First and Paragraph Twenty-Second of my

Will of June 9, 1937, and the addition of Paragraph Twenty-Fifth.

In Witness Whereof, I have hereunto set my hand this 3rd day of August, 1945.

OLOF ZETTERLUND.

The above instrument was, at the day thereof, signed, sealed, published and declared, by the said Olof Zetterlund, as and for a Codicil to his Will, in the presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses thereof.

PEARL LINDELAR,
of Los Angeles.

CHARLES LINDELAR,
of Los Angeles. [207]

Summary of the balance of my estate described herein and divided into twenty-seven (27) parts.

Sister Britta, one part.

Brother Johannes, one part.

Brother Carl, one part.

Brother Gustaf, one part.

Sister Karin, one part.

Nephew Albert, one part.

Nephew David, one part.

Niece Hulda, one part.

Niece Signe, one part.

Nephew Gustaf, one part.

Nephew Carl, one part.

Niece Ruth, one part.
Niece Naimie, one part.
Niece Hanna, one part.
Niece Sara, one part.
Nephew Gustaf, one part.
Nephew Enfrid, one part.
Nephew Samuel, one part.
Nephew Paul, one part.
Niece Hanna, one part.
Niece Ester, one part.
Niece Lydia, one part.
Niece Constance, one part.
Niece Hulda, one part.
Niece Maria, one part.
Nephew Paul, one part.
Nephew John, one part.

[Endorsed]: Filed August 31, 1945, Superior Court, California. [208]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 246,797

In the Matter of the Estate of
OLOF ZETTERLUND,

Deceased.

ORDER APPOINTING HAROLD M.
DAVIDSON SPECIAL ADMINISTRATOR

Good cause appearing therefor, and on motion of
Harold M. Davidson, one of the named co-execu-

tors in the codicil to the Last Will and Testament of Olof Zetterlund,

It is ordered by this Court, that Harold M. Davidson be, and he is hereby appointed Special Administrator of the estate of Olof Zetterlund, deceased. That as such Special Administrator he is authorized to proceed to Dade County, Florida, and that he shall have power to represent, to file objections to the naming of an executor other than himself in the state of Florida, to file a Petition for Probate of the estate of Olof Zetterlund in Dade County, Florida, or ancillary proceedings as he sees fit, to vote stock and carry on the business of Olof Zetterlund in the Elsinore Beach Corporation and Halland Land Company, both corporations of Florida; and as Special Administrator Harold M. Davidson is hereby authorized and empowered to take possession of all the real and personal property of the decedent and preserve it from damage, waste and injury, and to collect all claims, rents and other income [210] belonging to the estate, and to commence and maintain or defend suits and other legal proceedings as such Special Administrator; he is further authorized to sell perishable property and to exercise any and all other powers hereinbefore conferred upon him by this appointment; and Harold M. Davidson is authorized to spend from the funds of the estate of Olof Zetterlund such sum as is necessary to proceed to Florida and represent the estate in accordance with this order, and that his expenses shall not exceed the sum of \$700.00. Bond of said Special Administrator is hereby fixed at

\$2,000.00 corporate surety, or \$4,000.00 personal property.

Dated this 7th day of September, 1945.

NEWCOMB CONDEE,
Judge.

Approved as to form:

/s/ C. BROWN.

[Endorsed]: Filed Superior Court, September 7, 1945. [211]

In the Superior Court of the State of California
in and for the County of Los Angeles
Case No. 246,797

In the Matter of the Estate of
OLOF ZETTERLUND,

Deceased.

SPECIAL LETTERS OF ADMINISTRATION
State of California,
County of Los Angeles—ss.

Harold M. Davidson is hereby appointed special administrator of the Estate of Olof Zetterlund, deceased.

Witness, J. F. Moroney, Clerk of the Superior Court of the County of Los Angeles, with the seal of the court affixed, the 7th day of September, 1945.

By order of the Court.

[Seal] J. F. MORONEY,
County Clerk,

By K. CLARK,
Deputy.

State of California,
County of Los Angeles—ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California, and that I will faithfully perform, according to law, the duties of Special Administrator of the Estate of Olof Zetterlund, deceased.

HAROLD M. DAVIDSON.

Subscribed and sworn to before me, this 7th day of September, 1945.

[Seal] M. BARR,
Notary Public in and for County of Los Angeles,
State of California.

[Endorsed]: Filed Superior Court September 7, 1945. [212]

In the Superior Court of the State of California
in and for the County of Los Angeles
No. 246,797

In the Matter of the Estate of
OLOF ZETTERLUND,
Deceased.

ORDER ADMITTING CODICIL TO PROBATE
AND FOR LETTERS TESTAMENTARY

The petition of Dora Miller and Harold M. Davidson for the probate of the codicil of the will of said deceased and for Letters Testamentary thereon

coming regularly this day to be heard, and it being proved to the satisfaction of the Court that all notices of the said hearing have been given as required by law, and thereupon the Court proceeds to hear the evidence and grants said petition.

It is ordered and adjudged by the Court that the said Olof Zetterlund died on the 21st day of August, 1945, leaving estate in the State of California, and was then a resident of the County of Los Angeles, State of California; that the document herein filed purporting to be the codicil to Last Will and Testament of said deceased, be admitted to probate. That said Dora Miller and Harold M. Davidson be appointed co-executors, and Letters Testamentary thereon issued to them upon their taking the oath required by law, and they not be required to furnish bond.

Dated: Sept. 28, 1945.

NEWCOMB CONDEE,

Judge.

/s/ C. BROWN.

[Endorsed]: Filed Superior Court, September 28, 1945. [213]

In the Superior Court of the State of California
in and for the County of Los Angeles

Case No. 246,797

In the Matter of the Estate of
OLOF ZETTERLUND,

Deceased.

LETTERS TESTAMENTARY

State of California,
County of Los Angeles—ss.

The Last Will of Olof Zetterlund, deceased, having been proved in the Superior Court of the County of Los Angeles, Dora Miller and Harold M. Davidson who are named therein as such, Co-Executors hereby appointed Co-Executors.

Witness, J. F. Moroney, Clerk of the Superior Court of the County of Los Angeles, with the seal of the Court affixed, the 28th day of September, 1945.

By order of the Court.

[Seal] J. F. MORONEY,
County Clerk,

By /s/ C. Z. BAKER,
Deputy.

State of California,
County of Los Angeles—ss.

We do solemnly swear that we will support the Constitution of the United States, and the Consti-

tution of the State of California, and that we will faithfully perform, according to law, the duties of Co-Executors of the last Will and Testament of Olof Zetterlund, deceased.

/s/ DORA MILLER,

/s/ HAROLD M. DAVIDSON.

Subscribed and sworn to before me, this 28th day of September, 1945.

[Seal] /s/ V. A. MORGAN,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed, Superior Court, September 28, 1945. [214]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 246,797

In the Matter of the Estate of
OLOF ZETTERLUND,

Deceased.

SUPPLEMENTAL ORDER ADMITTING WILL
TO PROBATE AND SUPPLEMENTING
ORDER HERETOFORE MADE ADMIT-
TING CODICIL TO PROBATE

The supplemental petition of Harold M. Davidson and Dora Miller to admit will to probate and to supplement the order heretofore made admitting cod-

icil to probate, came on regularly to be heard on this 14th day of November, 1945, and it being proved to the satisfaction of the Court that all notices of said hearing have been given as required by law, and thereupon the Court proceeds to hear the evidence and grants said petition.

It is Ordered and Adjudged by the Court that the said Olof Zetterlund died on the 21st day of August, 1945, leaving estate in the State of California and was then a resident of the County of Los Angeles, State of California. That the document hereinbefore filed purporting to be the last will of said deceased, dated June 9, 1937 and a codicil to said will dated August 3, 1945, is declared to be the last will and testament of said deceased.

That the will dated June 9, 1937 is the will referred [215] to in the codicil. That the will of June 9, 1937, is the will, and each and every paragraph and allegation of said will are the allegations reaffirmed and realleged in Paragraph First in the codicil to last will dated August 3, 1945, and that Paragraphs Twenty-first and Twenty-second referred to in said codicil as being deleted from the former will, are Paragraphs Twenty-first and Twenty-second of the last will and testament of June 9, 1937. That the instrument reaffirmed and realleged in the codicil of August 3, 1945, is the same instrument as the last will and testament of June 9, 1937.

It Is Further Ordered and Adjudged that the record in this proceeding be supplemented to show

that the will now admitted to probate dated June 9, 1937, is the will referred to in the codicil and that the order heretofore made appointing the petitioners Harold M. Davidson and Dora Miller, co-executors of the codicil of the last will and testament of Olof Zetterlund, is hereby supplemented to read, co-executors of the last will and testament dated June 9, 1937 and the codicil thereto dated August 3, 1945.

Dated: November 15, 1945.

NEWCOMB CONDEE,
Judge.

O.K. as to form only:

/s/ [INDISTINGUISHABLE]

[Endorsed]: Filed, Superior Court, November 15, 1945. [216]

Official Capacity
Exemplified Copy

No. 246797

In the Matter of the Estate of
OLOF ZETTERLUND,

Deceased.

State of California,
County of Los Angeles—ss.

I, J. F. Moroney, County Clerk of the County of Los Angeles, State of California, and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify

and attest the foregoing to be a full, true and correct copy of the original Petition for Probate of Codicil to Will (with copies of Will and Codicil and Summary attached thereto), Order Appointing Harold M. Davidson Special Administrator, Letters of Administration, Order Admitting Codicil to Probate and for Letters Testamentary, Letters Testamentary and Supplemental Order Admitting Will to Probate and Supplementing Order Heretofore Made Admitting Codicil to Probate, on file or of record in my office, and that I have carefully compared the same with the original. I further certify that said Will and Codicil was duly executed and proved agreeably to the laws and usages of the State of California and also that said Letters have not been revoked and are in full force and effect on this date.

In Witness Whereof, I have hereunto set my hand and annexed the seal of the Superior Court of the State of California, in and for the County of Los Angeles, this 29th day of September, 1947.

/s/ J. F. MORONEY,

County Clerk of the County of Los Angeles, State of California, and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

State of California,
County of Los Angeles—ss.

I, Caryl M. Sheldon, Presiding Judge of the Superior Court of the State of California, in and

for the County of Los Angeles, do hereby certify that J. F. Moroney is County Clerk of the County of Los Angeles, State of California, and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles (which Court is a court of record, having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said J. F. Moroney as such officer; that the seal annexed thereto is the seal of said Superior Court; that said J. F. Moroney as such Clerk is the legal custodian of the original records or documents described and referred to in the foregoing certificate, is the proper officer to execute the said certificate and attestation, and such attestation is in due form according to the laws of the State of California.

In Witness Whereof, I have hereunto set my hand in my official character as such Presiding Judge, at the City of Los Angeles, County and State aforesaid, this 29th day of September, 1947.

/s/ CARYL M. SHELDON,
Presiding Judge of the Superior Court of the State
of California, in and for the County of Los
Angeles.

State of California,
County of Los Angeles—ss.

I, J. F. Moroney, County Clerk of the County of Los Angeles, State of California, and Clerk of the Superior Court of the State of California in and for the County of Los Angeles (which Court is a

court of record, having a seal which is annexed hereto), do hereby certify that Caryl M. Sheldon, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Presiding Judge of the Superior Court aforesaid and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the seal of the Superior Court, at my office in said County, this 29th day of September, 1947.

/s/ J. F. MORONEY,

County Clerk of the County of Los Angeles, State of California, and Clerk of the Superior Court of the State of California; in and for the County of Los Angeles.

(U. S. Rev. St., Sec. 905—Attestation of Clerk, Certificate of Judge, and Certificate of Clerk to official character of Judge.)

Receipt of Copy acknowledged.

[Endorsed]: Filed October 1, 1947. [217]

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT IN INTER-
PLEADER AND AMENDMENT THERETO

Comes now Thomas H. Kuchel, as Controller of the State of California, and by way of answer to the cross-complaint for interpleader on file herein admits, denies and alleges as follows:

I.

Thomas H. Kuchel alleges that he is the duly appointed, qualified and acting Controller of the State of California, and as such is charged with responsibility of collecting all inheritance taxes due the State of California.

II.

Admits all of the allegations of the cross-complaint in interpleader.

III.

Alleges that the order and decree of the Superior Court of the State of California, in and for the County of Los Angeles, finding that said decedent was a resident of California, is res adjudicata in this proceeding.

IV.

Alleges that the purported order or judgment of the County Judge's Court in and for Dade County, Florida, finding that the decedent, Olof Zetterlund, was a resident of Dade County, Florida, is not entitled in this proceeding to full faith and credit

under the Constitution of the United States of America because of the arbitrary action of said court in refusing to consider and admit to probate the codicil to the Last Will and Testament of said Olof Zetterlund referred to in the cross-complaint in interpleader.

Wherefore, this defendant in interpleader prays:

That this court adjudge that said Olof Zetterlund was a resident and domiciled in the State of California at the time of his death; that the State of California is the only state entitled to charge and receive inheritance taxes by virtue of the death of the said Olof Zetterlund on all of his intangibles wherever situated and determine that the cross-complainants and complainants in interpleader are entitled to the relief sought by them in their cross-complaint and their cross-complaint in interpleader against the said Samuel Nelson, individually and as the pretending executor of the Estate of Olof Zetterlund, deceased.

JAMES W. HICKEY,

MORTON L. BARKER, and

WALTER H. MILLER,

By MORTON L. BARKER,

Attorneys for State
Controller.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 10, 1949.

[Title of District Court and Cause.]

OPINION

Olof Zetterlund was born in Sweden on December 17, 1858. He immigrated to the United States of America when he was twenty-one years of age and became a citizen of the State of Florida, where, through the years, he acquired considerable property.

During the year 1927 he employed the defendant, Dora Miller, as a housekeeper, which employment relationship [243] continued until the date of his death. Some years preceding his death he became ill, and he and Dora Miller left Florida, seeking a climate more compatible to his health. After residing in several communities they finally located in California. On August 21, 1945, at San Gabriel in Los Angeles County, California, Olof Zetterlund died.

On August 3, 1945, eighteen days prior to his death, Olof Zetterlund made and executed a Codicil to his Last Will and Testament (made and executed in Florida on June 9, 1937), which Codicil named Harold M. Davidson and Dora Miller, the defendants herein, as co-executors of his Will.

On August 30, 1945, a petition was filed by Ellen W. Burdet in the probate court (County Judge's Court) of the State of Florida for probate of the Will of Olof Zetterlund, deceased. Petitioner at that time did not disclose to the Court (if she knew) that a Codicil, changing executors, had been

made and executed by Olof Zetterlund in California.

On September 6, 1945, James Q. Burdet filed a petition to probate the Last Will and Testament of Olof Zetterlund, deceased, and consequent thereon (and on the same date) the judge of the probate court (County Judge's Court) of Florida made an order admitting to probate the Last Will and Testament of Olof Zetterlund, deceased, bearing date June 9, 1937.

On September 25, 1945, Samuel Nelson, Constance Nelson Ericson and Arvid Ericson filed their petition for appointment of Executors of said Will. In the meantime, on August 31, 1945, in Los Angeles County, California, the defendants herein, Dora Miller and Harold M. Davidson, filed with the Superior Court (the probate court) of the State of [244] California, in and for the County of Los Angeles, a petition to probate the Codicil to said Will and, after notice duly given, the Court on the 28th day of September, 1945, made its order admitting the Codicil to the Last Will and Testament of Olof Zetterlund, deceased, to probate and appointing Dora Miller and Harold M. Davidson as co-executors.

Thereafter, on November 15, 1945, the Court made a supplemental order which, in part, read as follows:

“* * * the order heretofore made * * * is hereby supplemented to read, co-executors of the last will and testament dated June 9, 1937, and the codicil thereto dated August 3, 1945.”

On October 2, 1945, Dora Miller and Harold M. Davidson, as co-executors of the Last Will and Testament of Olof Zetterlund, deceased, filed in the probate court of Florida (County Judge's Court) a petition for revocation of the probate of the will (admitted to probate on September 6, 1945), in which petitioners prayed that the order admitting the alleged Last Will and Testament of Olof Zetterlund, deceased, be revoked; that the Court declare the residence of decedent to be Los Angeles County, California; that the Court admit the exemplified Codicil to the Last Will and Testament of Olof Zetterlund, with Will Annexed, for probate and ancillary proceedings, and that petitioners be appointed ancillary executors of said Last Will and Testament and Codicil of the decedent.

On January 24, 1946, the State of California, by and through its Comptroller, filed a similar petition.

On December 31, 1946, the probate court of the State of Florida made an order denying the petitions of the [245] State of California and of Dora Miller and Harold M. Davidson, and on January 17, 1947, said court made and entered its order appointing Samuel Nelson as the sole executor of the Last Will and Testament of Olof Zetterlund, deceased; and Samuel Nelson thereafter duly qualified as such executor.

Dora Miller, Harold M. Davidson and the State of California instituted an appeal to the Circuit Court of Dade County, Florida, of the order of said probate court.

On February 19, 1947, Samuel Nelson, as execu-

tor, filed a petition with the probate court of Florida, demanding delivery by Dora Miller and Harold M. Davidson of certain assets then in their possession, as described in said petition. A hearing was had, and on February 26, 1947, the court made and entered its order requiring Dora Miller and Harold M. Davidson to deliver certain assets as described in the order, which was duly served upon the attorney of record (in the Florida proceedings) for defendants herein. The record before us does not show an appeal was ever taken from the order of delivery.

On May 28, 1947, the Circuit Court of the Eleventh Judicial Circuit of Florida made its order affirming the probate court in finding that deceased died domiciled in the State of Florida; and subsequently the decision of the probate court and of the circuit court was duly affirmed by the Supreme Court of the State of Florida on April 30, 1948.

When defendants herein failed to comply with the order of delivery of the Florida probate court (made on February 26, 1947), this action was commenced in the Federal court at Los Angeles, California, by Samuel Nelson, individually, and as an heir, devisee and legatee of Olof Zetterlund, deceased, in his own behalf and on behalf of all other heirs, [246] devisees and legatees similarly situated, and as sole domiciliary executor of the Estate of Olof Zetterlund, deceased, and as Trustee of an express trust.

Plaintiff's complaint asks that the judgment of February 26, 1947 (of the Florida probate court,

requiring Dora Miller and Harold M. Davidson to deliver assets), be given full faith and credit and that said judgment be made a judgment of this court; that the defendants in said judgment be required to perform and satisfy each of the provisions of the judgment and that they be adjudged in contempt of court for their refusal and failure to comply with the terms and provisions of the judgment; that a resulting trust be declared of the property belonging to Olof Zetterlund, deceased, in the hands of the defendants; that an accounting be had and defendants be enjoined from exercising any functions as co-executors of the Last Will and Testament of Olof Zetterlund, deceased; and, further, that the proceedings initiated and prosecuted by the defendants in the probate court of Los Angeles County, California, be determined to be null and void for want of jurisdiction, and that the defendants be compelled to recognize and give effect to the judgment of the County Judge's Court (probate court) of the State of Florida.

Defendants filed their answer and a counter-claim herein, by which counter-claim they ask that this court decree Olof Zetterlund, at the time of his death, was a resident of and domiciled in the State of California; that the Superior Court of the State of California, in and for the County of Los Angeles, has full, complete and exclusive jurisdiction of the Estate of said deceased and that the cross-complainants are the true and lawful co-executors of [247] the Last Will and Testament and the Codicil of Olof Zetterlund, deceased.

Plaintiff contends that defendants Harold M. Davidson and Dora Miller, having filed a petition in the Florida probate court, having submitted themselves to the jurisdiction of the Florida court and having exercised their rights to appeal, which appeal was affirmed by the highest court of the State of Florida, are bound by the judgment of the proceedings they initiated, and that the judgments of the courts of the State of Florida are entitled to full faith and credit under the provisions of Section I, Article IV, of the Constitution of the United States of America.

Defendants allege that at the time of his death Olof Zetterlund was a resident of the County of Los Angeles, State of California; that they presented to the probate court in Los Angeles County, California, the Codicil to decedent's Last Will and Testament and said Last Will and Testament, and subsequently were appointed (by the Superior Court of Los Angeles County, California) co-executors of the Last Will and Testament of Olof Zetterlund, deceased, and the Codicil thereto.

The Federal Court is thus called upon to adjudicate the rights and responsibilities of two sets of executors—one appointed by the probate court of Florida and one appointed by the probate court of California.

The question of the right of a Federal Court to interfere with probate proceedings is by no means a new one. In 1892 the Supreme Court, in the case of *Byers v. McAuley*, 149 U.S. 608, laid down the following rules: [248]

1. “ * * * it is a rule of general application, that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court.

2. “An administrator appointed by a state court is an officer of that court; his possession of the decedent’s property is a possession taken in obedience to the orders of that court; it is the possession of the court, and it is a possession which cannot be disturbed by any other court.”

In *Watkins v. Eaton*, 183 F. 384, the court of the Second Circuit said, at page 387:

“We entirely concur with the conclusion of Judge Ray that the personal estate of the deceased situated in this state is now in the possession of the Surrogate’s Court of Madison County, and that the possession of such property by such court cannot be disturbed by any process issued out of the federal court, and that a decree cannot be pronounced and enforced by the federal court that the executor deliver the property in his hands as an officer of the Surrogate’s Court to the administrator with the will annexed appointed by the Michigan court * * *. It is surely unnecessary to cite authorities to show that the federal court has no jurisdiction to administer this extraordinary relief. It is sufficient to point out that in *Byers v. McAuley*, 149 U.S. 608, * * * the

Supreme Court states, as 'a proposition fully settled by the decisions of (that) court [249] that:

“ ‘An administrator appointed by the state court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is in the possession of the court, and it is a possession which cannot be disturbed by any court.’ ”

In a more recent case arising in this Circuit, *Markham v. Allen*, 326 U.S. 490, at 494, the Supreme Court reiterated the proposition that a Federal court

“* * * may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court.”

In *United States vs. Swanson*, 75 F. Supp. 118, at 123, the learned Judge said:

“We recognize that where property is in the actual possession of a court of competent jurisdiction, such possession may not be disturbed by process out of another court; further, that an administrator appointed by a state court is an officer of that court, and that his possession of the decedent's property is a possession taken in obedience to orders of that court, is a possession of the court and a possession which may not be disturbed by any other court.”

In the case at bar the property that plaintiffs wish turned over to them is property taken into possession by defendants as Executors, or as officers of the probate court; and as such property is in the possession of the probate court, it is impossible for this court to make an order disturbing its possession. [250]

It is evident from the facts adduced in this case that defendants herein were, by order of the California Probate Court, duly appointed co-executors of the Last Will and Testament of the deceased. There has been no evidence to show that the proceedings in the probate court in California were not regular. It also appears that the plaintiff herein was duly appointed Executor of the Will of decedent in Florida; that there is nothing in the record to indicate that his appointment was not regular and in conformity with Florida probate laws. It is true that defendants herein disagree with the conclusions reached by the Florida courts, but there is no indication in the record that the proceedings were anything but regular in all particulars.

Under order of the probate court of Florida plaintiff took possession of certain property belonging to deceased. Under order of the probate court of California defendants took possession of certain property belonging to deceased in California. Each possession is lawful under the orders of the respective probate courts. As we read the decisions, this Court does not have jurisdiction to disturb the possession of property in the probate

court, regardless of whether it is the probate court in Florida or the probate court in California.

We are not attempting in any way to disturb the decisions of the Florida courts, but we are not of the opinion that we have the right to order defendants, as co-executors appointed by the California court, to turn over to plaintiff certain property belonging to the deceased; nor do we feel that we have the right to tell the defendants, who are officers of the probate court in California, that they must obey the orders of a probate court in a foreign jurisdiction. [251]

It is our opinion that this Court does not have the right to interfere in any manner with the regular probate proceedings of the California or the Florida probate courts.

Judgment will be in favor of defendants on plaintiff's complaint and in favor of cross-defendants on the cross-complaint.

Dated this 11th day of June, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed June 11, 1951. [252]

In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil No. 7545—HW

SAMUEL NELSON, Individually, and as an Heir,
Devisee and Legatee of Olof Zetterlund, De-
ceased, Suing on His Own Behalf and on
Behalf of All Other Heirs, Devisees and Lega-
tees of Olof Zetterlund, Deceased, Similarly
Situated, etc.,

Plaintiff and Cross-Defendant,

vs.

DORA MILLER and HAROLD M. DAVIDSON,
Both Individually and as Pretending Co-
Executors, or Co-Executors De Son Tort, of
the Estate of Olof Zetterlund, Deceased,

Defendants and Cross-Complainants.

DORA MILLER and HAROLD M. DAVIDSON,
Co-Executors of the Estate of Olof Zetterlund,
Deceased,

Cross-Complainants and Complainants
in Interpleader,

vs.

STATE OF CALIFORNIA, and THOMAS E.
KUCHEL, as Controller of the State of Cali-
fornia,

Defendants in Interpleader.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled matter came on regularly to be heard April 5th, 1951, before the above-entitled Court, Honorable Harry C. Westover, District Judge, presiding, the plaintiff and cross-defendant, Samuel Nelson, individually and as an heir, devisee and legatee of Olof Zetterlund, deceased, appearing by his attorney, Edward O'Connor, of the firm of O'Connor & O'Connor, and defendants and cross-complainants, Dora Miller and Harold M. Davidson, both individually and as co-executors of the estate of Olof Zetterlund, deceased, appearing in person and through counsel, William J. Clark, and the State of California and Thomas H. Kuchel as Controller of the State of California, appearing through its attorney, Morton L. Barker, and the cause having been submitted to the Court for decision, based upon certain facts admitted by the parties in the matter, and with the request that the Court determine whether or not it could render a judgment based upon the admitted facts, before taking any evidence beyond the question as to whether or not the Federal Court could adjudicate the rights or responsibilities of the two sets of Executors, one appointed in the Probate Court of the State of Florida and one appointed by the Probate Court of the State of California, and the matter having been submitted to the Court for its decision, the Court now finds as follows:

Findings of Fact

Olof Zetterlund was born in Sweden on December 17, 1858. He immigrated to the United States of America when he was twenty-one years of age and became a citizen of the State of Florida, where, through the years, he acquired considerable property.

During the year 1927 he employed the defendant, Dora Miller, as a housekeeper, which employment relationship continued until the date of his death. Some years preceding his death he became ill, and he and Dora Miller left Florida, seeking a climate more [254] compatible to his health. After residing in several communities they finally located in California. On August 21, 1945, at San Gabriel in Los Angeles County, California, Olof Zetterlund died.

On August 3, 1945, eighteen days prior to his death, Olof Zetterlund made and executed a Codicil to his Last Will and Testament (made and executed in Florida on June 9, 1937), which Codicil named Harold M. Davidson and Dora Miller, the defendants herein, as co-executors of his Will.

On August 30, 1945, a petition was filed by Ellen W. Burdet in the probate court (County Judge's Court) of the State of Florida for probate of the Will of Olof Zetterlund, deceased. Petitioner at that time did not disclose to the Court (if she knew) that a Codicil, changing executors, had been made and executed by Olof Zetterlund in California.

On September 6, 1945, James Q. Burdet filed a petition to probate the Last Will and Testament of

Olof Zetterlund, deceased, and consequent thereon (and on the same date) the judge of the Probate Court (County Judge's Court) of Florida made an order admitting to probate the Last Will and Testament of Olof Zetterlund, deceased, bearing date June 9, 1937.

On September 25, 1945, Samuel Nelson, Constance Nelson Ericson and Arvid Ericson filed their petition for appointment of Executors of said Will. In the meantime, on August 31, 1945, in Los Angeles County, California, the defendants herein, Dora Miller and Harold M. Davidson, filed with the Superior Court (the Probate Court) of the State of California, in and for the County of Los Angeles, a petition to probate the Codicil to said Will and, after notice duly given, the Court on the 28th day of September, 1945, made its order admitting the Codicil to the Last Will and Testament of Olof Zetterlund, deceased, to probate and appointing Dora Miller and Harold M. Davidson as [255] co-executors.

Thereafter, on November 15, 1945, the Court made a supplemental order which, in part, read as follows:

“* * * the order heretofore made * * * is hereby supplemented to read, co-executors of the last will and testament dated June 9, 1937, and the codicil thereto dated August 3, 1945.”

On October 2, 1945, Dora Miller and Harold M. Davidson as co-executors of the Last Will and Testament of Olof Zetterlund, deceased, filed in the

probate court of Florida (County Judge's Court) a petition for revocation of the probate of the Will (admitted to probate on September 6, 1945) in which petitioners prayed that the order admitting the alleged Last Will and Testament of Olof Zetterlund, deceased, be revoked; that the Court declare the residence of decedent to be Los Angeles County, California; that the Court admit the exemplified Codicil to the Last Will and Testament of Olof Zetterlund, with Will Annexed, for probate and ancillary proceedings, and that petitioners be appointed ancillary executors of said Last Will and Testament and Codicil of the decedent.

On January 24, 1946, the State of California, by and through its Comptroller, filed a similar petition.

On December 31, 1946, the probate court of the State of Florida made an order denying the petitions of the State of California and of Dora Miller and Harold M. Davidson, and on January 17, 1947, said court made and entered its order appointing Samuel Nelson as the sole executor of the Last Will and Testament of Olof Zetterlund, deceased; and Samuel Nelson thereafter duly qualified as such executor.

Dora Miller, Harold M. Davidson and the State of California instituted an appeal to the Circuit Court of Dade County, Florida, of the order of said Probate Court.

On February 19, 1947, Samuel Nelson, as Executor, filed a [256] petition with the probate court of Florida, demanding delivery by Dora Miller and Harold M. Davidson of certain assets then in their

possession, as described in said petition. A hearing was had, and on February 26, 1947, the court made and entered its order requiring Dora Miller and Harold M. Davidson to deliver certain assets as described in the order, which was duly served upon the attorney of record (in the Florida proceedings) for defendants herein. The record before us does not show an appeal was ever taken from the order of delivery.

On May 28, 1947, the Circuit Court of the Eleventh Judicial Circuit of Florida made its order affirming the probate court in finding that deceased died domiciled in the State of Florida; and subsequently the decision of the probate court and of the circuit court was duly affirmed by the Supreme Court of the State of Florida on April 30, 1948.

When defendants herein failed to comply with the order of delivery of the Florida probate court (made on February 26, 1947), this action was commenced in the Federal court at Los Angeles, California, by Samuel Nelson, individually, and as an heir, devisee and legatee of Olof Zetterlund, deceased, in his own behalf and on behalf of all other heirs, devisees and legatees similarly situated, and as sole domiciliary executor of the Estate of Olof Zetterlund, deceased, and as Trustee of an express trust.

Plaintiff's complaint asks that the judgment of February 26, 1947 (of the Florida probate court, requiring Dora Miller and Harold M. Davidson to deliver assets), be given full faith and credit and that said judgment be made a judgment of this

Court; that the defendants in said judgment be required to perform and satisfy each of the provisions of the judgment and that they be adjudged in contempt of court for their refusal and failure to comply with the terms and provisions of the judgment; that a resulting trust be declared of the property belonging to [257] Olof Zetterlund, deceased, in the hands of the defendants; that an account be had and defendants be enjoined from exercising any functions as co-executors of the Last Will and Testament of Olof Zetterlund, deceased; and, further, that the proceedings initiated and prosecuted by the defendants in the probate court of Los Angeles County, California, be determined to be null and void for want of jurisdiction, and that the defendants be compelled to recognize and give effect to the judgment of the County Judge's Court (probate court) of the State of Florida.

Defendants filed their answer and a counter-claim herein, by which counter-claim they ask that this court decree Olof Zetterlund, at the time of his death, was a resident of and domiciled in the State of California; that the Superior Court of the State of California, in and for the County of Los Angeles, has full, complete and exclusive jurisdiction of the Estate of said deceased and that the cross-complainants are the true and lawful co-executors of the Last Will and Testament and the Codicil of Olof Zetterlund, deceased.

Plaintiff contends that defendants Harold W. Davidson and Dora Miller, having filed a petition in the Florida Probate Court, having submitted

themselves to the jurisdiction of the Florida Court and having exercised their rights to appeal, which appeal was affirmed by the highest court of the State of Florida, are bound by the judgment of the proceedings they initiated, and that the judgments of the courts of the State of Florida are entitled to full faith and credit under the provisions of Section I, Article IV, of the Constitution of the United States of America.

Defendants allege that at the time of his death, Olof Zetterlund was a resident of the County of Los Angeles, State of California; that they presented to the probate court in Los Angeles County, California, the Codicil to decedent's Last Will and Testament and said Last Will and Testament, and subsequently were [258] appointed (by the Superior Court of Los Angeles County, California) co-executors of the Last Will and Testament of Olof Zetterlund, deceased, and the Codicil thereto.

Conclusions of Law

And as Conclusions of Law, from the foregoing facts, the Court concludes that the proceedings in the probate court in California were legal, and in conformity with the California Probate laws, and that the proceedings in the probate court in Florida were legal, and in conformity with the Florida probate laws.

That under the order of the probate court of Florida, the Executor took possession of all property belonging to the deceased in the State of Florida, and under order of the Probate Court of

California, defendants and cross-complainants took possession of certain property belonging to the deceased in California. That each possession is lawful under the orders of the respective probate courts. That this court does not have jurisdiction to disturb the possession of property regardless of whether it is the probate court of Florida, or the probate court of California, and that it does not have the right to order the defendants, as co-executors appointed by the California Court, to turn over to plaintiff certain property belonging to the deceased, or allegedly belonging to the deceased, nor does this Court have jurisdiction to order the defendants to obey the orders of the probate court in a foreign jurisdiction.

That this court does not have the right to interfere in any manner with the legal probate proceedings of the State of California, or the State of Florida. That since there are executors in the State of California, that said executors have full right under the supervision of the probate court of [259] California, to marshal all of the assets of the deceased, and to submit their accounting to the probate court in California, and to no other party.

Let judgment be entered accordingly.

Dated July 2, 1951.

/s/ HARRY C. WESTOVER,
Judge.

Affidavit of Service by Mail attached.

Lodged June 25, 1951.

[Endorsed]: Filed July 3, 1951. [260]

United States Court of Appeals
for the Ninth Circuit

No. 13110

SAMUEL NELSON, Individually, and as an Heir,
Devisee and Legatee of Olof Zetterlund, De-
ceased, Suing on His Own Behalf and on
Behalf of All Other Heirs, Devisees and Lega-
tees of Olof Zetterlund, Deceased, Similarly
Situated, etc.,

Appellant,

vs.

DORA MILLER and HAROLD M. DAVIDSON,
Both Individually and as Pretending Co-
Executors, or Co-Executors De Son Tort, of the
Estate of Olof Zetterlund, Deceased,

Appellees.

MOTION FOR LEAVE TO DESIGNATE ADDI-
TIONAL PORTIONS OF THE RECORD

Comes Now the Appellee, Dora Miller, in the
above-entitled case, and asks leave to augment the
Transcript of Record heretofore prepared to in-
clude the following additional parts of the record:
(1) Opinion of the District Court; (2) Findings of
Fact and Conclusions of Law of the District Court;
(3) Cross-Complaint for Interpleader and Declara-
tory Relief; and (4) Answer to Cross-Complaint in
Interpleader and Amendment Thereto.

The said motion is made on the grounds that
Appellee feels the additional designations are neces-

sary for the consideration of said case and to correct pertinent omissions of such record and to more fully show what actually occurred in the proceedings of the case before the United States District Court for the Southern District of California, Central Division, and for the reasons as more particularly set forth in the Affidavit of W. Alan Thody, attached hereto and made a part hereof, and in accordance with the Stipulation entered into by and among the parties hereto, which Stipulation is also attached hereto and made a part hereof.

ROLAND RICH WOOLLEY, and

W. ALAN THODY,

By /s/ W. ALAN THODY,

Attorneys for Appellee,

Dora Miller.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF W. ALAN THODY

State of California,

County of Los Angeles—ss.

W. Alan Thody, being first duly sworn, deposes and says:

That he is an attorney at law and duly licensed to practice in the State of California, and that he is of counsel in the above-entitled action, representing Appellee, Dora Miller; that he was not an attorney of record at the trial of the above-entitled action in the United States District Court for the

Southern District of California, Central Division, and that for such reasons he was not intimately acquainted with the record before that Court.

Affiant further states that in the preparation of the brief of Appellee, Dora Miller, it is noted and it fairly appears that the Transcript of the Record heretofore designated is incomplete, and that the following further designations should be made: (1) Opinion of the District Court; (2) Findings of Fact and Conclusions of Law of the District Court; (3) Cross-Complaint for Interpleader and Declaratory Relief; and (4) Answer to Cross-Complaint in Interpleader and Amendment Thereto, in order that such Record will fully and more accurately show what transpired during the proceedings of such lower court, and Affiant prays leave that the Motion of Appellee, Dora Miller, for Augmentation of the Record be granted.

/s/ W. ALAN THODY.

Subscribed and sworn to before me on February 4, 1952.

[Seal] /s/ FRANCES A. DIXON,
Notary Public in and for
Said County and State.

My commission expires Oct. 31, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION PERMITTING AUGMENTA-
TION OF THE TRANSCRIPT OF THE
RECORD

It Is Hereby Stipulated and Agreed by and among the parties in the above-entitled action, by and through their respective attorneys, that the Transcript of Record heretofore filed by the Appellant with the United States Circuit Court of Appeals for the Ninth Circuit may be supplemented to include the following portions of the record: (1) Opinion of the District Court; (2) Findings of Fact and Conclusions of Law of the District Court; (3) Cross-Complaint for Interpleader and Declaratory Relief; and (4) Answer to Cross-Complaint in Interpleader and Amendment Thereto.

It Is Further Agreed that any and all notices, appearances and arguments as required by Rule Seventeen of the United States Circuit Court of Appeals for the Ninth Circuit, are hereby expressly waived.

ROLAND RICH WOOLLEY, and

W. ALAN THODY,

By /s/ W. ALAN THODY,

Attorneys for Appellee,
Dora Miller.

O'CONNOR & O'CONNOR,
By /s/ EDWARD J. O'CONNOR,
Attorneys for Appellant,
Samuel Nelson.

WILLIAM J. CLARK, ESQ.,
/s/ WILLIAM J. CLARK,
Attorney for Appellee,
Harold M. Davidson.

/s/ WALTER H. MILLER,
Senior Inheritance Tax Atty.

/s/ WALTER H. MILLER,
Attorney for State Controller,
State of California.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge;

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,
United States Circuit Judges.

[Endorsed]: Filed February 7, 1952.

[Endorsed]: No. 13110. United States Court of Appeals for the Ninth Circuit. Samuel Nelson, Individually, and as an Heir, Devisee and Legatee of Olof Zetterlund, Deceased, Suing on His Own Behalf and on Behalf of All Other Heirs, Devisees and Legatees of Olof Zetterlund, Deceased, Similarly Situated, Appellant, vs. Dora Miller and Harold M. Davidson, Both Individually and as Pretending Co-Executors, or Co-Executors De Son Tort, of the Estate of Olof Zetterlund, Appellees. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 24, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 13110

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL NELSON, Individually, and as an Heir, Devisee
and Legatee of Olof Zetterlund, Deceased, Suing on
His Own Behalf and on Behalf of All Other Heirs,
Devisees and Legatees of Olof Zetterlund, Deceased,
Similarly Situated,

Appellant,

vs.

DORA MILLER and HAROLD M. DAVIDSON, Both Indi-
vidually and as Pretending Co-Executors *de son tort*,
of the Estate of Olof Zetterlund, Deceased,

Appellees.

BRIEF OF APPELLANT.

O'CONNOR & O'CONNOR,
530 West Sixth Street,
Los Angeles 14, California,

Attorneys for Appellant.

FILED

Of Counsel,

C. A. HIAASEN,

Broward National Bank Building,
Fort Lauderdale, Florida,

JAN 14 1952

PAUL P. O'BRIEN
CLERK

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No. 13110

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL NELSON, Individually, and as an Heir, Devisee and Legatee of Olof Zetterlund, Deceased, Suing on His Own Behalf and on Behalf of All Other Heirs, Devisees and Legatees of Olof Zetterlund, Deceased, Similarly Situated,

Appellant,

vs.

DORA MILLER and HAROLD M. DAVIDSON, Both Individually and as Pretending Co-Executors *de son tort*, of the Estate of Olof Zetterlund, Deceased,

Appellees.

BRIEF OF APPELLANT.

I.

Jurisdiction.

The appellant is an adult resident and citizen of the State of New Jersey, and Executor of the Estate of Olof Zetterlund, deceased, by order of the Probate Court of the State of Florida, and the appellees are adult residents and citizens of the State of California and pretending Co-executors of the Estate of Olof Zetterlund, deceased, and the amount involved is in excess of \$3,000.00.

In the controversy appellant requests that full faith and credit be given to the judgment rendered by the Con-

stitutional Courts of the State of Florida in accordance with Section 1, Article IV of the Constitution of the United States of America.

II.

Preliminary Statement.

Olof Zetterlund died in Los Angeles County in the State of California on August 21, 1945. The original Last Will and Testament of Olof Zetterlund, dated June 9, 1937, was filed for probate in the County Judge's Court in and for Dade County, State of Florida and on September 5, 1945 the said Last Will and Testament was admitted to probate in the Florida court.

On October 2, 1945 appellees, Dora Miller and Harold M. Davidson, filed a petition in the County Judge's Court in and for Dade County, State of Florida, praying:

(1) That the Order admitting the Last Will and Testament of Olof Zetterlund, deceased, to probate, be revoked;

(2) That the County Court of Dade County, State of Florida, declare Olof Zetterlund to be a resident of Los Angeles County, State of California at the time of his death;

(3) That the said Florida Court admit a Codicil to the Last Will and Testament of Olof Zetterlund, deceased, for probate and ancillary proceedings in the State of Florida; (The Codicil was dated August 3, 1945 and named appellees, Dora Miller and Harold M. Davidson as Co-executors.)

(4) That appellees be appointed Ancillary Executors of the Last Will and Testament, and the Codicil thereto, of Olof Zetterlund, deceased.

The State of California, through its Comptroller, also filed a petition with the appellees herein in the Florida Court, contending that the decedent was a resident of the State of California at the time of his death. A hearing was had on the petition filed by Dora Miller and Harold M. Davidson, appellees herein, and the State of California, and judgment was entered, denying the petitions filed by the appellees and the State of California and ordering: (1) that the Last Will and Testament of Olof Zetterlund, dated June 9, 1937, be admitted to probate in the State of Florida; (2) that Olof Zetterlund was a resident of the State of Florida at the time of his death; (3) that the purported Codicil not be admitted to probate; and (4) that the appellees not be appointed Ancillary Executors of the estate of Olof Zetterlund, deceased, and further ordering that the appellant be appointed Executor of the said estate.

The appellees appealed from the judgment of the County Judge's Court to the Circuit Court for the Eleventh Judicial Circuit, in and for Dade County, State of Florida. The said Circuit Court affirmed the judgment of the lower court. The appellees herein again appealed from the said Circuit Court to the Supreme Court of the State of Florida. The Supreme Court of the State of Florida affirmed the judgments of the lower courts. (*Dora Miller, et al. v. Nelson*, 160 Fla. 410, 35 So. 2d 288.)

The Probate Court in the State of Florida ordered the appellees to deliver and transfer all assets in their possession belonging to the estate of Olof Zetterlund, to the appellant herein, as Executor. This the appellees declined to do. The appellant thereupon filed this suit in the United States District Court in and for the Southern

District of California to compel compliance with the judgment entered in the State of Florida, on the basis that the said action in Florida having been instituted by the appellees, the judgment entered against them is *res judicata* and that the said judgment is entitled to full faith and credit pursuant to the Constitution of the United States, and that the appellees be compelled to deliver and transfer all of the property in their possession belonging to the said estate.

III.

Issue.

Is the judgment heretofore entered against the appellees by the Constitutional Courts of the State of Florida in a proceeding instituted by the appellees entitled to full faith and credit in the United States District Court in and for the Southern District of California, and is the said judgment *res judicata* as to the issues presented by the appellees therein?

IV.

Facts.

Olof Zetterlund died on August 21, 1945 in the County of Los Angeles, State of California. [Tr. 86.] On September 6, 1945 the Last Will and Testament of Olof Zetterlund, which was dated June 9, 1937, was admitted to domiciliary probate in the Florida Court. [Tr. 29-30.] On October 2, 1945 Dora Miller and Harold M. Davidson, appellees herein, filed their petition in the County Judge's Court in and for Dade County, State of Florida, for revocation of probate, which petition prayed: (1) That the Order admitting the Instrument alleged to

be the Last Will and Testament of Olof Zetterlund, entered February 6, 1945 by the Florida Court, be revoked; (2) That the Court declare Olof Zetterlund to be a resident of the County of Los Angeles, State of California at the time of his death; (3) That the Court admit the exemplified Codicil to the Last Will and Testament of Olof Zetterlund, with Will annexed, for probate and ancillary proceedings in the said Court; (4) That Dora Miller and Harold M. Davidson, appellees herein, be appointed Ancillary Executors of the Last Will and Testament, and Codicil thereof, of Olof Zetterlund, deceased. [Tr. 31.] The State of California, through its Comptroller, joined in the petition and petitioned the Florida Court for a determination that the decedent was a resident of the State of California at the time of his death. The appellees herein presented to the Court in the State of Florida an alleged Codicil to the Last Will and Testament of Olof Zetterlund, which Codicil was dated August 3, 1945, naming and appointing Dora Miller and Harold M. Davidson as Co-Executors of his Last Will and Testament. [Tr. 35.]

The Answer and defense to the said petition was filed by Samuel Nelson, appellant herein, and others, on October 11, 1945 in the County Judge's Court in and for Dade County, State of Florida, wherein it was denied that Dora Miller and Harold M. Davidson are Co-Executors of the estate of Olof Zetterlund, deceased, and denied that Olof Zetterlund was a resident of the County of Los Angeles, State of California at the time of his death, and alleged that he was a resident and citizen of the State of Florida at the time of his death; that the Last Will and Testament dated June 9, 1937 constituted the complete Last Will and Testament of the decedent, and

that the purported Codicil was a nullity and of no effect, and alleged that the said Codicil, dated August 3, 1945, was procured by Dora Miller and Harold M. Davidson, her attorney, through fraud and duress; that in proceedings in the Superior Court in and for the County of Los Angeles, State of California, Dora Miller and Harold M. Davidson, three months prior to the Codicil and on May 17, 1945, instituted proceedings to be appointed guardians of the said decedent, contending that he was incompetent and incapable of caring for and managing his property and his estate. Said petition was submitted to the Superior Court in and for the County of Los Angeles, State of California, and on May 23, 1945, together with medical proof and proof that the decedent was eighty-five years of age, upon receipt of such proof the Court made its Order declaring the decedent incompetent and incapable of taking care of himself and of managing his property. The defenses further alleged that at the time of the making of the Codicil on August 3, 1945, three months after being declared incompetent, and no proceeding ever having been instituted to restore the decedent to competency, the decedent was still incompetent by adjudication of the said Court and was not capable of executing a Codicil to his Last Will and Testament. The defenses further alleged that Dora Miller was the decedent's household servant and employee and that Harold M. Davidson was her attorney, and that they took advantage of the decedent. [Tr. 38-42.]

The petition of the State of California, through its Comptroller, was filed in the County Judge's Court in and for Dade County, State of Florida, on January 24, 1946. [Tr. 55.]

The issues presented in the appellees' petition, together with the petition filed by the State of California and the defenses presented thereto by the appellant herein, were tried in the County Judge's Court in and for Dade County, State of Florida, Honorable W. F. Blanton, Judge Presiding, and on December 31, 1946 judgment was entered denying the petitions and adjudicating that the decedent was a resident of the State of Florida at the time of his death and denying the existence of the purported Codicil and holding that the Last Will and Testament of the said decedent was rightfully and lawfully admitted to probate in Dade County, on September 6, 1945. [Tr. 66-68.]

Order was entered by the said Court appointing the appellant herein as Executor of the said estate on January 17, 1947. [Tr. 68.]

On January 28, 1947 Dora Miller and Harold M. Davidson, appellees herein, and the State of California, filed notice of appeal to the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, State of Florida, with assignments of error from the judgment entered in the County Judge's Court, wherein it was assigned that the lower Court erred as follows:

(1) In entering the Order of January 31, 1946, concluding that the decedent was a resident of the State of Florida at the time of his death and that the Last Will and Testament of June 9, 1937 was properly admitted to probate in the County Judge's Court in and for Dade County, State of Florida;

(2) In denying the petition to revoke probate of the Will in Florida and concluding that the decedent was a resident of the State of Florida at the time of his death;

(3) In making its Order denying the petition of the appellees herein to revoke probate proceedings in Dade County, State of Florida and in declaring the decedent a resident of the State of Florida at the time of his death and in declining to appoint appellees, Dora Miller and Harold M. Davidson, Ancillary Executors in Dade County, State of Florida. [Tr. 76-77.]

On February 26, 1947 Honorable W. F. Blanton, Judge of the County Court in and for Dade County, State of Florida, made and entered an Order requiring Dora Miller and Harold M. Davidson to deliver assets to the appellant as Executor of the estate of Olof Zetterlund, deceased. [Tr. 79-84.]

The appellees herein presented their appeal to the said Circuit Court and a hearing was had on the same. On May 28, 1947 the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, State of Florida, affirmed the judgment of the lower Court and held that the decedent, during his long life had always been a resident of Florida and that this had not been changed under the circumstances, because of age, condition of his health and his mental capacities, reviewed all of the evidence introduced at the hearing by the appellees and concluded that Olof Zetterlund had not acquired a new domicile and remained a resident of the State of Florida. [Tr. 85-86.]

The appellees again appealed from the judgment of the Circuit Court to the Supreme Court of the State of Florida. The Supreme Court of the State of Florida, in a detailed opinion, outlined all of the incidents of the decedent's life, commencing with the time he was born in Sweden, reviewing how he first came to the United States and resided in Florida; how he took a trip with his housekeeper, Dora Miller, at the age of eighty-three, and left Florida for the purpose of medical treatment and care in various changes of climate; reviewing, also the letters and documents which transpired between the decedent, Dora Miller, the appellee, and business associates and relatives in Florida. Upon review of the detailed evidence offered by both the appellees and the executor in the courts of the State of Florida, and referring to decedent's advanced age at the time he was declared incompetent on a petition by Dora Miller and Harold M. Davidson, and the fact that the Codicil was executed three months after petitions to have him declared incompetent, the Supreme Court of the State of Florida affirmed the judgment of the lower Courts on the proceedings instituted by the appellees in the said Court on June 28, 1948. [Tr. 98-100.] (*Dora Miller et al. v. Samuel Nelson*, 160 Fla. 410, 35 So. 2d 288.)

The appellees herein have declined to comply with the Order entered on February 26, 1947 in the Florida Court, directing Dora Miller and Harold M. Davidson to deliver assets in their possession and belonging to the estate of Olof Zetterlund, to the appellant, as Executor of the

said estate. The present complaint was filed herein predicated on the judgment rendered in the Courts of the State of Florida and upon the judgment of the action instituted there by the appellees.

The appellant contends that the appellees herein, having filed their petition in the Constitutional Courts in the State of Florida for a determination of decedent's residence, revocation of probate proceedings and recognition of the validity of purported Codicil to the Will and a request for the appellees to be appointed Ancillary Executors, has been decided upon the petition instituted by appellees in the Constitutional Courts in the State of Florida and that the judgments, having been appealed and having become final, are now *res judicata*; that the judgment of the Constitutional Courts of the State of Florida is entitled to full faith and credit in the United States District Court in and for the Southern District of California, and that the said judgment is the basis of the complaint filed in the United States District Court in and for the Southern District of California, and that the appellees should be directed to transfer and deliver all assets in their possession to the appellant as Executor of the estate of Olof Zetterlund, deceased. The appellees herein, having gone to Florida to institute suit in the State of Florida, and having had full opportunity to present all evidence and having exercised their rights to appeal to the higher Courts, and having done so, that all the issues presented therein are *res judicata* and the appellees are now bound by the judgment of the said Courts.

V.

Argument.

As Dora Miller and Harold M. Davidson, appellees herein, and the State of California, instituted a suit in the Constitutional Courts of the State of Florida, and having pursued that suit to final judgment in the said Courts, that judgment is *res judicata* as to the issues presented therein and the same are entitled to full faith and credit in the United States District Court in and for the Southern District of California.

The Supreme Court of the United States recently, in *Sherrer v. Sherrer*, 344 U. S. 343, in a situation similar in principle to the present facts, held that such a judgment was *res judicata* and that the same was entitled to full faith and credit in the courts of the United States.

In that case the wife left the matrimonial domicile in Massachusetts and went to Florida and there instituted a suit for divorce against her husband. Upon notification of the pending divorce suit, the husband appeared in the Court of Florida personally and testified. A decree of divorce was entered in that State in favor of the wife. The wife, immediately after obtaining the decree of divorce, remarried. The husband subsequently instituted a statutory action in Massachusetts for a declaration that he was justifiably living apart from his wife, whose divorce and subsequent marriage he alleged to be invalid. The Supreme Court of the United States held that the husband had appeared and participated in the divorce proceedings in the State of Florida. The decision of that court was *res judicata* as to the action and the decree was entitled to full faith and credit in Massachusetts. The *Sherrer* decision by the Supreme Court of the United

States establishes the law firmly and clearly that where parties institute or participate in legal proceedings in another state, the decisions of that State are *res judicata* as to the matters presented therein and that such a judgment is entitled to full faith and credit in another state, as provided for in Section 1, Article IV of the Constitution of the United States.

This rule was again enunciated in the case of *Davis v. Davis*, 305 U. S. 32. The petitioner therein filed a complaint in Virginia for a divorce, alleging residence in that State. The respondent appeared in the Virginia Court and challenged the residence of the petitioner and introduced evidence to show the allegations as to domicile were false and other exceptions to the Commissioner's report. The Virginia Court entered a decree holding the petitioner a resident of Virginia. The petitioner was granted a divorce. Thereafter, the petitioner applied to the District Court for the District of Columbia to have the decree modified. The respondent again appeared and endeavored to raise the fact that the petitioner was not domiciled in Virginia. This position brought into place the Full Faith and Credit Clause. The Supreme Court held that the determination of the Virginia Court on the question of domicile was conclusive upon all of the parties who appeared thereon. A portion of the Court's opinion reads as follows:

"As to petitioner's domicile for divorce and his standing to invoke jurisdiction of the Virginia Court, its finding that he was a *bona fide* resident of that State for the required time is binding upon the respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the State Court, for she appeared there and by plea

put in issue his allegations as to domicile, introduced evidence to show it false, took exceptions to the Commissioner's report, and sought to have the Court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation. *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U. S. 522."

The principle of law, as stated in the *Sherrer* and *Davis* cases, has been consistently enunciated by the Supreme Court of the United States and is so stated in the following cases:

Johnson v. Muelberger, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 552, Decided March, 1951;

Hughes v. Fetter, 341 U. S. 609, 71 S. Ct. 980, 95 L. Ed. 1212, Decided June, 1951;

Cook v. Cook, 20 U. S. Law Week 4033, 96 L. Ed. 94, Decided December, 1951.

In California, Section 1933 of the Code of Civil Procedure reads as follows:

"The effect of a judicial record of a sister state is the same in this State as in the state where it was made."

Article IV, Section 1 of the Constitution of the United States provides as follows:

"Full faith and credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Full Faith and Credit Clause and the Statute which implements it, require the judgments of the courts of one state to be given the same faith and credit in another state as they have by law or usage in the state rendering them.

Morris v. Jones, 329 U. S. 671;

New York ex rel. v. Halby, 330 U. S. 610.

In the Florida proceeding the appellees and each of them, appeared personally and by their petition put in issue: (a) the domicile of Olof Zetterlund, deceased; (b) the validity of the purported Codicil to the Last Will and Testament of Olof Zetterlund, deceased; and (c) the rights of the appellees to act as lawful Executors of the estate of Olof Zetterlund, deceased. They introduced evidence and testimony to support the allegations contained in their petitions and sought to have the Constitutional Courts of the State of Florida sustain the allegations of their petition. The Courts, having entered final judgment upon the issues presented, the judgment is effective for all purposes in this litigation. It is further emphasized that under the doctrine of continuing jurisdiction, the judgments of the Florida Courts are binding and that all orders made by the Florida Court in this probate proceedings are binding upon the appellees and are entitled to full faith and credit. The rule is well established by the Supreme Court of the United States and is enunciated in the case of *Michigan Trust Co. v. Ferry*, 228 U. S. 346, and again in *Freeman v. Bee Machine Co.*, 319 U. S. 448, that in instances where the Probate Court has made Orders, such Orders are binding upon the person who was within the jurisdiction and who participated in the probate procedure. The fact that the person may leave the state does not deprive the original state of its

jurisdiction. In the present case, under this law, where the appellees appeared and instituted proceedings in the State of Florida and the Probate Court has made Orders in response to the proceedings so instituted, such Orders remain in effect and such judgment continued to exist and jurisdiction is not lost because the appellees have left the State and returned to California. The judgments so entered are entitled to full faith and credit under the Constitution of the United States and is the basis herein for the present proceedings filed in the United States District Court.

In *Commissioner v. Sunnen*, 333 U. S. 591, the Supreme Court of the United States stated:

“It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound ‘not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.’ *Cromwell v. Sac County*, 94 U. S. 351, 352; 24 L. Ed. 195, 197. The judgment puts an end to the cause of action, which can-

not again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.”

By the Constitutional provision for full faith and credit “the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence. The clause of the Constitution brings to our Union a useful means for ending litigation. Matters once decided between adverse parties in any state or territory are at rest. Were it not for this full faith and credit provision, so far as the Constitution controls the matter, adversaries could wage again their legal battles whenever they met in other jurisdictions . . . That clause compels that controversies be stilled so that where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered.”

Roche v. McDonald, 275 U. S. 449;

Riley v. New York Trust Co., *supra*.

Section 732.01 of the Florida Probate Law is as follows:

“JURISDICTION OF COUNTY JUDGE: The County Judge shall have jurisdiction of the administration, settlement, and distribution of estates of decedents, of the probate of wills, of the establishment of lost or destroyed wills, of the granting of letters testamentary and of administration, and of all other matters usually pertaining to courts of probate.”

VI.

Conclusion.

It is respectfully submitted that the appellees, havng filed a petition in the Courts of the State of Florida praying: (1) that the probate proceedings of the Last Will and Testament of Olof Zetterlund, deceased, be revoked; (2) that the Court declare Olof Zetterlund to be a resident of the State of California at the time of his death; (3) that the Court admit the Codicil to the Last Will and Testament of Olof Zetterlund for probate and ancillary proceedings in the State of Florida; and (4) that the appellees be appointed Ancillary Executors of the Last Will and Testament of Olof Zetterlund, deceased; and having procured a judgment on their petition and having appealed that judgment to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, State of Florida, and having again appealed that judgment to the Supreme Court of the State of Florida, that such judgment is *res judicata* as to the issues presented therein and that the said judgment in the State of Florida is entitled to full faith and credit in the United States District Court in and for the Southern District of California;

Further, that the Court of competent jurisdiction in the State of Florida, having ordered the appellees to deliver all assets in their possession to the appellant as Executor of the Estate of Olof Zetterlund, is entitled to full faith and credit and should be enforced in the United States District Court in and for the Southern District

of California against the appellees and that the appellees be compelled to deliver and transfer all of the said assets to the appellant, as Executor;

Further, that the judgment of the United States District Court in and for the Southern District of California be reversed, with instructions that the lower court order the appellees to deliver to the appellant, as Executor of the said Estate, the assets described in the complaint.

Respectfully submitted,

O'CONNOR & O'CONNOR,

By EDWARD J. O'CONNOR,

Attorneys for Appellant.

Of Counsel,

C. A. HIAASEN,

No. 13110

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL NELSON, individually; and as an heir, devisee and legatee of Olof Zetterlund, deceased, suing on his own behalf and on behalf of all other heirs, devisees and legatees of Olof Zetterlund, deceased, similarly situated; etc.,

Plaintiff and Cross-Defendant,

vs.

DORA MILLER and HAROLD M. DAVIDSON, both individually, and as pretending co-executors, or co-executors *de son tort*, of the estate of Olof Zetterlund, deceased,

Defendants and Cross-Complainants.

DORA MILLER and HAROLD M. DAVIDSON, co-executors of the Estate of Olof Zetterlund, deceased,

Cross-Complainants and Complainants in Interpleader,

vs.

STATE OF CALIFORNIA, and THOMAS H. KUCHEL, as Controller of the State of California,

Defendants in Interpleader.

Brief of Appellee Harold M. Davidson, Individually and as Co-Executor of Estate of Olof Zetterlund, Deceased.

WILLIAM J. CLARK,

3935 East Huntington Drive,

Pasadena 8, California,

Attorney for Appellee Harold M. Davidson.

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Defendants in Interpleader.

Brief of Appellee Harold M. Davidson, Individually and as Co-Executor of Estate of Olof Zetterlund, Deceased.

I.

Preliminary Statement.

Olof Zetterlund died on August 21, 1945; at the time of his death he was a resident of the County of Los Angeles, State of California, and for a long time prior

to his death was a resident of and domiciled in Los Angeles County. On August 31, 1945, a petition was filed by Dora Miller and Harold M. Davidson as Executors named in the Codicil to the Will of Olof Zetterlund, as such executors to probate the Codicil and the Will of Olof Zetterlund, deceased, and on September 28, 1945, pursuant to the petition so filed, the Superior Court of the State of California, in and for the County of Los Angeles, admitted the Codicil and the Will of Olof Zetterlund deceased to probate and appointed Dora Miller and Harold M. Davidson as co-executors of said estate and letters testamentary were issued to said parties.

On August 30, 1945, the original last will of Olof Zetterlund without the codicil, was filed in the County Judges Court of Dade County, Florida. On September 25, 1945, plaintiff and others filed their petition in said Court for their appointment as executors of the original will of Olof Zetterlund deceased. Then on October 2, 1945, Dora Miller and Harold M. Davidson under orders of the Superior Court of the State of California, in and for the County of Los Angeles, as co-executors under the last will and codicil of Olof Zetterlund, deceased, filed their petition for revocation of the probate in the State of Florida and filed forthwith an exemplified copy of the codicil to the last will and testament and of the probate proceedings in California. They claimed that the domicile of Olof Zetterlund was in California and that the California Courts had so declared and that the estate was all personal property in Florida, and there was no real

estate involved in the State of Florida, and that it was not necessary to probate the will in Florida, however, as it was so probated the codicil should be admitted. The Court in Florida failed to take any action whatsoever on the codicil offered. The Court in Florida further declared that the competency or incompetency of the deceased was not an issue in the case and it disregarded the Court of California and failed to give full faith and credit to its decision, and proceeded to declare the residence of the deceased to be in Florida.

Florida has adjudicated the residence and domicile of Olof Zetterlund was in Florida but failed to admit the codicil or to take any action thereon. California on the other hand has adjudicated that Olof Zetterlund was a resident of and domiciled in the State of California, and this judgment has become final, and the California Court did admit the codicil to probate.

With this situation, Samuel Nelson, individually, etc., as named in the complaint, filed an action against Dora Miller and Harold M. Davidson, individually and as pretending co-executors, etc., of the estate of Olof Zetterlund, knowing full well that the Courts in California had appointed them as co-executors and that they were not pretending executors or co-executors *de son tort*, and in said cause sued to establish the judgment of the State of Florida as a judgment of the District Court of the United States. On the other hand, Dora Miller and Harold M. Davidson filed a certified copy in their capacity

as co-executors of the estate of Olof Zetterlund, seeking declaratory relief and bringing in by interpleader, the State of California, which had made demand upon the Executors for inheritance tax, and in which it had claimed that the property in the State of Florida should be taxed in California as it was personal property and was within the jurisdiction of the State of California.

The matter was duly set for trial, and at the time of trial it was stipulated between counsel for the respective parties, in open Court, that the real issue to be determined by the Court and upon which the Court would have to pass before proceeding any further in the matter, would be IS THE JUDGMENT OF THE FLORIDA COURT OR THE JUDGMENT OF THE CALIFORNIA COURT ENTITLED TO RECOGNITION BY THE DISTRICT COURT OF THE UNITED STATES. It was upon this issue that the matter was submitted on briefs. From the judgment on this issue this appeal was taken.

II. Issue.

Is the judgment of the Florida Court declaring the residence of Olof Zetterlund to be in Florida, entitled to recognition by this Court or is the judgment of the State of California, admitting the will and codicil to probate and declaring the residence of Olof Zetterlund to be in California entitled to recognition by this Court, or shall the Court refuse to decide this issue between the two Courts.

III.

Argument.

Appellants have argued that the judgment in Florida is *res adjudicata* as to issues presented, and is therefore entitled to full faith and credit in the United States District Court in and for the Southern District of California, and based their argument on the case of *Sherrer v. Sherrer*, 344 U. S. 343.

The confusion arises in citing this type of case, with the distinction made by our courts between civil actions and probate proceedings. The matter of a probate proceeding is a limited proceeding. Here we have a conflict of laws of two States. When the issue was tried in Florida before the Florida Court, Dora Miller and Harold M. Davidson were appearing there as California executors named in the codicil and were acting under the orders of the State of California as co-executors, they were officers of the California Court and the Florida Court surely could not bind by its decision, officers of the California Court. Florida failed and refused to recognize the judgment of the California Court declaring the residence and domicile of the deceased to be in California.

Quoting from 11 American Jurisprudence, page 484, Section 178:

"The general principle is well settled that the full faith and credit clause of the Federal Court does not preclude an inquiry into the jurisdiction of the Court rendering the judgment or decree." (This is in reference to the effect of a Foreign probate.)

"In pursuance of this principle it is quite generally held that a decree of one state admitting a will to

probate is not conclusive as to the domicile of the decedent, and this is regarded as a jurisdictional question.”

Under the general theory in the majority of Courts, it is maintained that the effect of a decree proving a will, like that of a decree granting administration, is confined *de jure* to the territory, and things within the territory of the State setting up the Courts. The full faith and credit clause of the Federal Constitution does not, according to this view, effect the operation of the probate of a will, as a judicial act of a State beyond its own territories. Full faith and credit is given to such a decree when it is left where it is found local in nature and operation.

Quoting from Restatement of the Law, under CONFLICT OF LAWS, page 563, Section 467:

“An administrator is appointed to administer the estate of a decedent by a competent Court of the State:

- (a) Where the decedent was domiciled at the time of his death.
- (b) Where there are assets of the decedent at the time of the death of the decedent, or at the time of the appointment of the administrator.”

Under Section 469, page 569:

“The will of a deceased person can be admitted to probate in a competent court of any State, in which an administrator could have been appointed, had the decedent died intestate.”

Quoting further from said CONFLICT OF LAWS, Section 470, page 570, Subdivision 2:

“A judgment in administration proceedings by a competent court in the State of domicile, will not of itself invalidate a prior inconsistent judgment by a Court in another State in Administration of the estate of the same decedent in that State.”

Subdivision 3:

“A judgment in administration proceedings in any State, is conclusive upon all persons who became subject to the jurisdiction of the Court in such proceedings.”

Subdivision 4:

“If an issue as to State in which a decedent was domiciled at the time of his death is raised, by a person not precluded from raising the issue under Subdivision 3, a Court will not regard itself as concluding by a prior finding made in another State as to the place of the decedent’s domicile.”

* * * * *

“Neither the Fourteenth Amendment nor the full faith and credit clause of the Federal Constitution requires uniformity in the decisions of the Courts of different states on questions of domicile, where the exertion of State power is dependent upon domicile within its boundaries.”

Worcester County Trust Co. v. Riley, 302 U. S. 292, 82 L. Ed. 268, 58 S. Ct. 185.

In pursuance of this principle, it is quite generally held that a decree of one State admitting a will to probate

is not conclusive as to the domicile of the decedent, for this is regarded as a jurisdictional question.

2 Am. Jur., p. 485, Sec. 178;

Burbank v. Ernst, 232 U. S. 162;

Tilt v. Kelsey, 207 U. S. 43.

The general principle is well settled that the full faith and credit clause of the Federal Constitution does not preclude an inquiry into the jurisdiction of the Court rendering the judgment or decree. In pursuance of this principle, it is quite generally held that a decree of one State admitting a will to probate is not conclusive as to the domicil of the decedent, for this is regarded as a jurisdictional question. (*Tilt v. Kelsey* (1907), 207, U. S. 43, 52 L. Ed. 95, 28 S. Ct. Rep. 1; *Burbank v. Ernst* (1914), 232 U. S. 162; 58 L. Ed. 551, 34 S. Ct., Rep. 299; *Holyoke v. Holyoke* (1913), 110 Me. 469, 87 Atl. 40; *Scripps v. Wayne Probate Judge* (1902), 131 Mich. 265, 100 Am. Ct. Rep. 614, 90 N. W. 1061; *Re Horton* (1916), 217 N. Y. 363, 111 N. E. 1066, Ann. Cas. 1918a, 611; *Smith v. Smith* (1918), 122 Va. 341, 94 S. E. 777.) A decree of a Texas Court admitting a will to probate is not denied full faith and credit by a judgment of a Louisiana Court annulling the will on the grounds that the testator died domiciled in Louisiana, and that by the laws of that state the will was void, although it may be that the conduct of the testator in Louisiana as evidenced by a notarial declaration of a Louisiana domicile, and by his official act as executor resident in that state, was given greater effect by reason of the Louisiana statute, to counterbalance the testator's declaration that Texas was his permanent home, than

others might give him. (*Burbank v. Ernst* (1914), 232 U. S. 162, 58 L. Ed. 551, 34 S. Ct. Rep. 299.)

It has been consistently held that neither the decree of *res adjudicata* nor estoppel by judgment renders a foreign decree of probate conclusive as respects property situated in the state other than the one in which the decree was rendered.

Re Barries Estate, 240 Iowa 431, 35 N. W. 2d 658, 9 A. L. R. 2d 1939; Cert. den., 338 U. S. 881; Reh. den., 338 U. S. 881; 94 L. Ed. 541, 70 S. Ct. 154.

Conclusion.

The appellees in this case would like very much to have the Court determine the question of residence and domicile, as a matter of fact because they feel that the Court would have a full opportunity to learn all of the facts and that it would decide as California did. However, by careful study of the cases, appellees believe that the lower court rendered a correct decision; that the District Court of the United States should not interfere with the conflicting courts of California and Florida.

Respectfully submitted.

WILLIAM J. CLARK.

Attorney for Appellee Harold M. Davidson.

APPENDIX.

Part A.

ISSUE.

The appellants have stated the issue as being whether or not the judgment of the Florida Court is entitled to full faith and credit in the U. S. District Court, and is the said judgment *res adjudicata* as to the issues presented by the appellees therein. As we see it the issue is whether or not the U. S. District Court will interfere with the conflicting decisions of the Courts of California and the Courts of Florida.

In the facts the appellants have failed to include the factual pleadings of the answer and cross-complaint filed by the appellees in the lower Court. By stipulation however, the record has now been completed and now shows that the California Court found that Olof Zetterlund was a resident of Los Angeles County. The Florida Courts never gave any consideration to the Codicil in either admitting or denying the same; That the situs of the personal property was never in Florida; that the Florida Court never gave full faith and credit to the California judgment which was rendered prior to the Florida judgment and of which the Florida Court had full notice.

That the question of competency was never the issue; that Harold M. Davidson and Dora Miller appeared in Florida in the capacity of co-executors named in the Codicil to the will of Olof Zetterlund, deceased. That the Florida Court made no finding whatsoever on the Codicil or on the appointment of Harold M. Davidson and Dora Miller as co-executors.

No. 13110

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL NELSON, individually; and as an heir, devisee and legatee of Olof Zetterlund, deceased, suing on his own behalf and on behalf of all other heirs, devisees and legatees of Olof Zetterlund, deceased, similarly situated; etc.,

Appellant, Plaintiff and Cross-Defendant,

vs.

DORA MILLER and HAROLD M. DAVIDSON, both individually, and as pretending co-executors, or co-executors *de son tort*, of the estate of Olof Zetterlund, deceased,

Appellees, Defendants and Cross-Complainants.

DORA MILLER and HAROLD M. DAVIDSON, co-executors of the Estate of Olof Zetterlund, deceased,

Cross-Complainants and Complainants in Interpleader,

vs.

STATE OF CALIFORNIA, and THOMAS H. KUCHEL, as Controller of the State of California,

Defendants in Interpleader.

BRIEF OF APPELLEE, DORA MILLER.

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IN THE

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FOR THE NINTH CIRCUIT

SAMUEL NELSON, individually; and as an heir, devisee and legatee of Olof Zetterlund, deceased, suing on his own behalf and on behalf of all other heirs, devisees and legatees of Olof Zetterlund, deceased, similarly situated; etc.,

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Appellees, Defendants and Cross-Complainants.

DORA MILLER and HAROLD M. DAVIDSON, co-executors of the Estate of Olof Zetterlund, deceased,

Cross-Complainants and Complainants in Interpleader,

vs.

STATE OF CALIFORNIA, and THOMAS H. KUCHEL, as Controller of the State of California,

Defendants in Interpleader.

BRIEF OF APPELLEE, DORA MILLER.

I.

Jurisdiction.

The appellee, Dora Miller, is an adult resident and citizen of the State of California and a Co-Executor of the Estate of Olof Zetterlund, Deceased, by order of the Probate Court of the State of California, and Harold M. Davidson, appellee, is an adult citizen of the State of New

Jersey and a Co-Executor of the Estate of Olof Zetterlund, Deceased, by order of the Probate Court of the State of Florida. The amount in the alleged controversy is in excess of \$3,000.00, exclusive of interest and costs.

In the alleged controversy proceedings, appellant requests that full faith and credit be given to the judgment rendered by the Constitutional Courts of the State of Florida in accordance with Section 1, Article IV of the Constitution of the United States of America.

Preliminary Statement.

This appellee, Dora Miller, appeared and petitioned the courts of Florida as legatee under the last will and testament of Olof Zetterlund and as Co-Executor under the codicil of such last will and testament. In so appearing, appellee attempted to institute ancillary probate administration in that state. As a prelude to such proceedings, appellee did seek, as it was necessary so to do, revocation of the domiciliary probate proceedings theretofore commenced in said state, but which proceedings had been commenced subsequent to domiciliary proceedings in the State of California. Appellee in said petition did represent to the Florida Court that the codicil with a copy of the will attached was filed for probate in the Superior Court of the State of California in and for the County of Los Angeles on August 31, 1945, and that the same was admitted to probate by such court on September 28, 1945. The filing of said petition and the procedure adopted and followed by said appellee was calculated to carry out an orderly system of administration of the estate of decedent wherever assets were located. Appellee

recognized that ancillary probate administration may be had in any state in which decedent left property. The State of Florida, through the judgment of the County Judge's Court in and for Dade County, State of Florida, dated December 31, 1946, rejected such orderly proceeding. Instead, said Court did enter on February 26, 1947, its order commanding appellee to deliver all intangible personal property in her possession owned by Olof Zetterlund at the time of his death, knowing full well appellee was serving as Co-Executor in the California proceeding and holding property in such capacity. Appellant now seeks to compel enforcement of this judgment under the full faith and credit clause of the United States Constitution, and to thereby give extraterritorial effect to probate proceedings of the State of Florida.

Issues.

(1) Does the United States District Court in and for the Southern District of California have jurisdiction to declare that the judgment dated February 26, 1947, entered by the Court of the State of Florida is entitled to full faith and credit;

(2) Even assuming such District Court has jurisdiction, shall such Court declare that full faith and credit be given; or,

(3) May such District Court in the exercise of its discretionary authority decline such recognition; and

(4) Does Appellant, either individually or as purported class representative, have proper legal capacity to seek such recognition in such District Court?

Facts.

Olof Zetterlund died in Los Angeles County, in the State of California, on August 21, 1945, having resided in such state continually since the Fall of 1941.

On August 31, 1945, domiciliary administration was commenced in the Superior Court in and for the County of Los Angeles, State of California, and an order was entered by said Court on September 28, 1945, admitting the Codicil to the Last Will and Testament of said Olof Zetterlund, deceased, dated August 3, 1945, and granting Letters Testamentary appointing Dora Miller and Harold M. Davidson, the appellees, as Co-Executors.

On September 6, 1945, domiciliary proceedings were commenced in the County Justice Court in and for Dade County, in the State of Florida, and on such date the Last Will and Testament of Olof Zetterlund, dated June 9, 1937, was admitted to probate and, thereafter, Samuel Nelson, the appellant, was named as Executor of the Estate.

On October 2, 1945, Dora Miller, as legatee and Co-Executor under the Codicil above-named, and appellee, Harold M. Davidson, as Co-Executor under the Codicil above-named, filed a petition in the County Judge's Court in and for Dade County, in the State of Florida, setting forth that Olof Zetterlund was a resident of the City of San Gabriel, County of Los Angeles, State of California, at the time of his death on August 21, 1945, and for some time prior thereto and was not a resident of the State of Florida at the time of his death and that on the third day of August, 1945, decedent did make, declare, and publish a Codicil to his original Will dated June 9, 1937, in and by which Codicil he declared himself to be a resi-

dent of the County of Los Angeles, State of California. Appellee as one of the petitioners in the Florida proceeding did pray:

(1) That the order admitting the Instrument alleged to be the Last Will and Testament of Olof Zetterlund, deceased, entered September 6, 1945, by said Court, be revoked;

(2) That the County Court of Dade County, State of Florida, declare Olof Zetterlund to be a resident of Los Angeles County, State of California, at the time of his death;

(3) That the said Florida Court admit a Codicil to the Last Will and Testament of Olof Zetterlund, deceased, for probate and ancillary proceedings in the said Court of the State of Florida (an exemplified copy of the Codicil to the Last Will and Testament was annexed thereto);

(4) That appellees be appointed Ancillary Executors of the Last Will and Testament, and the Codicil thereof, of said Olof Zetterlund, deceased, and in the alternative, that if the said Court found appellees disqualified, that it appoint some suitable person as Ancillary Executor of the exemplified copy of the Codicil with the Will annexed of the said Olof Zetterlund, deceased.

On January 24, 1946, the State of California by and through its Controller, Harry B. Riley, filed its petition for revocation of the Florida probate and for ancillary probate of the Will of Olof Zetterlund, deceased, in the State of Florida.

On September 31, 1946, Judge Blanton, County Judge, County Judge's Court in and for Dade County, State of Florida, made and entered his judgment, order and decree, finding that the said Olof Zetterlund, deceased, was at the time of his death, to-wit: the twenty-first day of August, 1945, a resident and citizen of the State of Florida and County of Dade, and that his said Last Will and Testament was rightfully and lawfully admitted to probate in Dade County, Florida, on September 6, 1945, and that the probate proceedings in said Court continue and proceed as an original and domiciliary administration.

On December 31, 1946, the Probate Court of the State of Florida made an order denying the petitions of the State of California and of Dora Miller and Harold M. Davidson.

On January 17, 1947, the Probate Court of the State of Florida made and entered an order appointing Samuel Nelson as the sole executor of the Last Will and Testament of Olof Zetterlund, deceased. Samuel Nelson thereafter duly qualified as such executor.

Dora Miller, Harold M. Davidson and the State of California appealed from the order of said Probate Court to the Circuit Court of Dade County, Florida.

On February 19, 1947, Samuel Nelson, as executor, filed a petition with the Probate Court of Florida, demanding that Dora Miller and Harold M. Davidson deliver certain assets then in their possession. A hearing

was had and on February 26, 1947, the Honorable W. F. Blanton, County Judge of the County Judge's Court in and for Dade County, State of Florida, made and entered an order requiring Dora Miller and Harold M. Davidson to deliver intangible personal property in their possession owned by Olof Zetterlund, now deceased, at the time of his death.

The appellees appealed from the judgment and order of the County Judge's Court to the Circuit Court for the Eleventh Judicial Circuit, in and for the County of Dade, State of Florida. The said Circuit Court affirmed the judgment of the lower court. Thereupon appellees appealed from the Circuit Court to the Supreme Court of Florida. The Supreme Court of the State of Florida affirmed the judgment of the lower court on April 30, 1948 *Dora Miller et al v. Nelson*, 160 Fla. 410, 35 So. 2d 288).

The appellant thereafter filed this suit in the United States District Court in and for the Southern District of California in an attempt to compel compliance with the judgment entered in the State of Florida on February 26, 1947, and to declare that the appellees be adjudged in contempt of court for their refusal and failure to comply with the terms and provisions of said judgment. Appellant included in its complaint four separate and distinct causes of action.

On March 3, 1949, appellees as Co-Executors of the estate of Olof Zetterlund in the probate proceedings

brought in the Superior Court, of the County of Los Angeles in and for the State of California, filed a cross-complaint for Interpleader and Declaratory relief. They prayed that the District Court adjudge and determine who are the proper representatives of the above estate, and adjudge and determine whether the State of California is entitled to inheritance tax from the estate. Appellees attached as exhibits to said cross-complaint exemplified copies of all of the orders and petitions of the Probate Court of the California Superior Court admitting to probate the Last Will and Testament of Olof Zetterlund and the Codicil thereto.

The case was submitted to the Court for decision, based upon certain facts admitted by the parties in the matter and with the request that the Court determine whether or not it could render a judgment based upon the admitted facts, before taking any evidence beyond the question of whether or not the Federal Court could adjudicate the rights or responsibilities of the two sets of executors, one appointed in the Probate Court of the State of Florida and one appointed by the Probate Court of the State of California.

On July 3, 1951, Judge Harry C. Westover entered a judgment for the appellees on the first, third and fourth causes of action of the original complaint and noted in said judgment that the second cause of action had been dismissed upon motion of appellant made in open Court. From this appellant now appeals.

Summary of Argument.

A. No "case" or "controversy" is presented as required by Article III of the United States Constitution and therefore the District Court lacks jurisdiction.

B. Even assuming the District Court has jurisdiction, which appellee contends it does not, said Court can properly decline to exercise jurisdictional power and choose not to interfere with the local probate affairs of the respective states of Florida and California.

C. The relief prayed for by appellant for the compulsory recognition of a Florida judgment would be improper and would be in derogation of the sovereignty of the State of California and the Probate Courts thereof, and would preclude such Courts from effectively carrying out the orderly probate administration within the State of California.

D. Appellant is improperly making a collateral attack upon the judgment of the Superior Court in and for the County of Los Angeles, State of California.

E. The Florida judgment is not *res judicata* on the issues there presented since there was lack of jurisdiction over the parties and the subject matter of the action.

F. Appellant does not have proper capacity to institute legal proceedings in the State of California in his own behalf or in behalf of the class of persons purportedly represented by him.

ARGUMENT.

A. No "Case" or "Controversy" Is Presented as Required by Article III of the United States Constitution and the District Court Lacks Jurisdiction.

Appellant has instituted suit in the United States District Court on the ground of diversity of citizenship. A Federal District Court has jurisdiction over an action based on diversity of citizenship only if there exists an actual, substantial controversy between the citizens of different states and when that does not appear, the action must be dismissed.

Engel v. Tribune Co. (1951), 189 F. 2d 176.

A "justiciable issue" to meet the requirements of Article III of the Constitution of the United States was not presented before the District Court. There was no proper "case" or "controversy" to give such Court jurisdiction in appellant's first cause of action to which appellant now confines his appeal. In such cause of action the Court was called to determine the effect to be given the judgment dated February 26, 1947, and further, as was specifically noted by Judge Westover, to determine the rights and authority to be accorded to probate proceedings in the states of Florida and California, respectively. It was dealing strictly with local probate processes and no "case" or "controversy" was thereby set for adjudication. A similar situation was noted by the Fifth Circuit in the recent case of *Heath v. Jones* (June 10, 1948), 168 F. 2d 460. (Rehearing denied July 26, 1948.) At page 462, it was stated:

"By a long series of federal decisions it is established that generally probate matters such as the

validity of a will and the administration of a decedent's estate are so far proceedings *in rem* as not to be among the 'controversies' of which the district courts may be given jurisdiction under Article Three of the Constitution, and have been given jurisdiction under the statutes. See *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599; *Farrell v. O'Brien*, 199 U. S. 89, 25 S. Ct. 727, 50 L. Ed. 101; *Sutton v. English*, 246 U. S. 199, 38 S. Ct. 254, 62 L. Ed. 644, as to probate of wills; and *Byers v. McAuley*, 149 U. S. 608, 13 S. Ct. 906, 37 L. Ed. 867; *Smith v. Jennings*, 5 Circ., 238 F. 151, as to general administration of estates. Particular claims to or against the estate, however, may be decided in a federal court as controversies *inter partes*, the probate court being bound to recognize the judgment in its administration; *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, 43, 30 S. Ct. 10, 54 L. Ed. 80; *Markham v. Allen*, 326 U. S. 490, 66 S. Ct. 296, 298, 90 L. Ed. 256."

See also: *Porter v. Bennison*, 180 F. 2d 523, certiorari denied, 71 S. Ct. 47, 340 U. S. 817, 95 L. Ed. 600.

It is noteworthy and highly significant that the District Court in the instant case was not considering a particular claim presented to or against the estate. It was dealing with an ambitious attempt of Florida to channel property through the probate administration of that State rather than to permit California to pursue its regular probate administration of such property. Albeit under either system of probate administration the same heirs, legatees and devisees under the Last Will and Testament of Olof Zetterlund would ultimately receive distribution. The existence of any contest, if such may be said to exist, deals solely with the selection of probate administration to handle property, and as to whether the codicil is to be admitted. No "case" or "controversy" in the constitutional sense, is presented.

B. The District Court Was Correct in Declining to Interfere With Probate Affairs of the Respective States of Florida and California.

The ultimate problem for consideration by the District Court was the adjudication of the rights and responsibilities of two sets of executors—one appointed by the Probate Court of Florida and one appointed by the Probate Court of California. This was the salient issue for adjudication noted by Judge Harry C. Westover in his opinion. It is there authoritatively set out that each State has the right to handle probate administration and the possession of property in such State and to supervise the duties and responsibilities of its probate officers. These fundamental State rights should not be interfered with by federal courts.

Byers v. McAuley, 149 U. S. 608;

Watkins v. Eaton, 183 Fed. 384, 387;

Markham v. Allen, 325 U. S. 846, 65 S. Ct. 1402;

United States v. Swanson, 75 Fed. Supp. 118, 123.

It was within the discretion of the District Court to decline interference with the probate courts of either Florida or California, and the judgment of the Court represents a correct exercise of the Court's discretion. Basing decisions on the doctrine among others of *forum non conveniens*, Federal Courts have declined to exercise jurisdictional power of the forum when vexation or improper judicial interference would result. *Gulf Oil Corporation v. Gilbert*, 330 U. S. 501 (1947). It was there noted by Mr. Justice Jackson:

“On substantially *forum non conveniens* grounds we have required federal courts to relinquish decision of cases within their jurisdiction where the court would have to participate in the administrative policy of a state. *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 570; *Burford v. Sun Oil Company*, 319 U. S. 315.”

C. Compulsory Recognition of the Florida Judgment Would Be in Derogation of the Rights of Sovereignty of the State of California, and Would Preclude the Latter State from Effecting Orderly Probate Administration.

Probate are essentially *in rem* proceedings. They concern the administration of property then before the Court, or in the case of domiciliary probate, concern both the administration and the distribution of such property. Probate may be commenced in any and every State where property is located. The right and power to deal with such property is one of the important attributes of sovereignty. The right to protect local creditors, and the right to have probate administration conform to local law and local regulation are all inherent residual rights vested in the State.

Any attempt by a Federal Court to deprive any State of the inherent rights of probate in accordance with local law is contrary to our very constitutional scheme. The Supreme Court in its decisions has left each State free to assert its full power over local property in disregard of foreign probate judgments.

Clarke v. Clarke, 178 U. S. 186 (1900);

Blount v. Walker, 134 U. S. 607 (1890).

Where conflicting claims of domicile exist, the Supreme Court has rejected the argument that the full faith and credit clause required that the first such adjudication be respected

Riley v. New York Trust Co., 315 U. S. 343 (1942);

Overby v. Gordon, 177 U. S. 214 (1900).

In *Thormann v. Frame*, 176 U. S. 350 (1900), the reasoning for this principle was succinctly stated as follows:

“Now a judgment *in rem* binds only the property within the control of the court which rendered it . . . as a judgment *in rem* it merely determined the right to administer the property within the jurisdiction, whether considered as directly operating on the particular things seized, or the general status of assets there situated.”

Further, Chief Justice Waste noted in the case of *In re Reynolds Estate*, 217 Cal. 557, 20 P. 2d 323, 324:

“Since the testator’s domicile is the jurisdictional fact, and since the recognition which is given by other states to the law of the testator’s domicile is merely a rule of conflict of laws, the decision of one state, to the effect that a testator is domiciled there, is not binding on any other state, even under the full faith and credit clause of the federal Constitution (article 4, §1); but other states in which a testator’s property is situated, may determine such question, each state for itself, without reference to the decree of the state which passed upon that question first in point of time.” (Citing cases.)

Clearly, therefore, the State right of sovereignty relating to probate administration should remain unhampered and without Federal interference.

Even in the great majority of State cases in which the full faith and credit clause has been an issue, the courts have asserted full dominion over local property, both real and personal in disregard of foreign decrees.

Cases:

In re Reynolds' Estate, 217 Cal. 557, 20 P. 2d 323 (1933);

Foster v. Kragh, 107 Colo. 389, 113 P. 2d 666 (1941);

Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940).

D. Appellant Is Improperly Attempting Through a Federal District Court to Make Collateral Attack Upon a Valid Judgment of the State of California.

The obvious purport and effect of the order of the Florida Court dated February 26, 1947, is to divest the appellees of all personal property of the decedent held by appellees in their official capacity as Co-Executors of the estate of Olof Zetterlund under California Probate procedure. Appellant seeks thereby to give extra-territorial effect to a foreign judgment and to reach property outside the jurisdiction of the Court rendering said judgment, and event to reach property, in the constructive possession of the Probate Court of the State of California held pursuant to judgments of such Court. For failure of appellee to comply with said judgment, appellant prays appellee be declared in contempt of court. Thus, a collateral attack is made on California judgments, and probate proceedings.

The California judgments admitting the codicil and will of the decedent to probate are valid and subsisting judgments and are *res judicata* as to the issues therein presented.

If an attack is to be made upon the probate judgments of the California Court an orderly procedure therefor is set forth in Section 380 of the California Probate Code which reads as follows:

“S. 380. Who may contest after probate: Filing of petition. When a will has been admitted to probate, any interested person, other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein, may, at any time within six months after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that probate be revoked.”

Yet, in the absence of a petition for revocation, the granting of letters testamentary is conclusive on the question of the jurisdiction of the State of California and cannot be collaterally attacked. (Section 302 of the California Probate Code.)

See also:

In re Crisler's Estate (1948), 188 P. 2d 772, 83 Cal. App. 431.

The State Courts of California would not permit Appellant to make attack upon its own proceedings. The Federal District Court sitting in such State must not therefore permit such attack.

Any attempt by appellant to make such a collateral attack under the guise of “full faith and credit” is entirely improper and without merit.

E. The Florida Judgment Is Not Res Judicata and Is Not Conclusive on the Issues There Presented Since Such Court Lacked Jurisdiction Over the Parties and Subject Matter.

Want of jurisdiction, either as to persons to the suit or as to the subject matter of the action negative the very existence of the legal obligation sought to be imposed. Such deficiency may therefore be inquired into at any time in considering the enforcement of any judgment.

Florida lacked jurisdiction over the appellee in her capacity as Co-Executor of the California proceedings. By the descriptive and subtle designation given appellee in this action as “pretending co-executor *de son tort*,” appellant attempts to sue appellee in her representative authority but is denying her authority to act. It is true appellee did not appear in the Florida proceedings in her representative capacity, though such capacity was made known to the Florida court at that time. Yet through the judgments of the Florida courts an attempt is made to reach personal property held by appellee in her official capacity. Submission to the jurisdiction of the Court by Appellee by entering a voluntary appearance does not confer jurisdiction upon such Court to render judgment against appellee in her representative capacity. (21 Am. Jur. 930.) An “*in personam*” judgment is binding only on the parties or their privies. Despite appellant’s great reliance on *Sherrer v. Sherrer*, 334 U. S. 343, 92 L. Ed. 1431, full faith and credit cannot be binding upon appellee in her representative capacity. It is implicit from the very contents and character of the Florida judgment here sought to be enforced that such attempt is being made. Moreover, the property sought to be reached is in the constructive pos-

session of the California courts. As such, the Florida judgment attempts to deal with property not within the territorial limits of Florida when the judgment was entered and not rightfully before the Court irrespective of the fiction of "*mobilia sequentur personam*" or any other legal theory. The Court not having jurisdiction of the subject matter, the full faith and credit clause has no application.

Full faith and credit of the Florida judgment dated February 26, 1947, should therefore be denied.

F. Appellant Lacks Legal Capacity Individually and as a Purported Class Representative to Bring Suit in the United States District Court.

By express statute, the State of California refuses to permit a foreign executor to enforce a foreign judgment in this state unless by special authority and in an action or special proceeding. *California Code of Civil Procedure*, Section 1913, expressly provides:

"S. 1913. Record of another state, its effect. The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executive or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority."

This provision is binding upon the Federal Courts sitting in the State of California.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 585 S. C. 404.

This Code Section above referred to received attention by this Circuit in the very recent case of *Wallan et al. v. Rankin et al.* (Mar. 11, 1949), 173 F. 2d 488, (rehearing denied April 11, 1949) at page 493, where it was noted:

“It is, of course, the universal rule, true in California as elsewhere, that in the ordinary situation a suit by a foreign executor or administrator may not be maintained without ancillary appointment in the state of the forum. Code of Civil Procedure, §1913. The reasons for this practice are too familiar to warrant elaboration here. *Cf. Ghilian v. Couture*, 84 N. H. 48, 146 A. 395, 65 A. L. R. 553, and annotation. Whether suits such as the present constitute an exception to the rule is a question to which the California authorities give no precise answer. In at least two cases, however, the courts of that state have departed from the rule in exceptional circumstances. *Cf. In re Estate of Rawitzer*, 175 Cal. 585, 166 P. 581; *Fox v. Tay*, 89 Cal. 339, 24 P. 855, 26 P. 897, 23 Am. St. Rep. 474.”

The departures from the rule referred to in the *Wallan* case bear no resemblance to the instant factual situation. Here, the District Court was not dealing with the legal capacity of a trustee to institute suit nor with a foreign judgment based upon a debt or specific claim. It was dealing with a judgment concerning the processes of administration of a probate court. Clearly, Appellant individually did not have the right to seek enforcement of that judgment nor legal capacity to commence suit in the California District Court.

Moreover, appellant cannot institute suit in the District Court as a purported class representative. There is no privity between appellant and the class of heirs, legatees, and devisees appellant purports to represent.

See:

Hansberry v. Lee (1940), 311 U. S. 32, 85 L. Ed. 22, 61 S. Ct. 115, 132 A. L. R. 741;

Baker v. Baker, Eccles & Co. (1917), 242 U. S. 386, 394.

Conclusion.

In the alleged cause of action to which appellant now confines his appeal no "case" or "controversy" is presented as required to meet fundamental constitutional requirements of the Federal Court. The Court therefore lacked jurisdiction to adjudicate the matter therein presented.

Even assuming there was no want of proper jurisdictional authority, the District Court properly refused to exercise its jurisdictional power, and properly refused to disturb possession of property in the custody of a State Court and properly refused to disturb the respective probate proceedings of sister States.

Appellant is merely attempting through access to the Federal Courts to collaterally attack valid judgments of the State of California, and to attack and interfere with the orderly probate proceedings of that State. Such collateral attack is improper.

In attempting to effectuate recognition of the Florida judgment dated February 26, 1947, by the United States District Court, appellant lacks legal capacity to commence such action. Moreover, the judgment sought to be so enforced should not be accorded full faith and credit in that the Florida Court lacked jurisdiction of the subject matter and over the parties against whom such judgment is sought to be enforced.

The judgment of the District Court should be affirmed.

Respectfully submitted,

W. ALAN THODY,

ROLAND RICH WOOLLEY,

By W. ALAN THODY,

Attorneys for Appellee.

No. 13115

United States
Court of Appeals
for the Ninth Circuit.

R. M. PERRIN and MARY PERRIN,

Appellants,

vs.

ALUMINUM COMPANY OF AMERICA and
C. S. THAYER,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington
Southern Division

FILED

NOV 30 1951

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. CLERK

No. 13115

United States
Court of Appeals
for the Ninth Circuit.

R. M. PERRIN and MARY PERRIN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Portland, Oregon.

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523 Tacoma Bldg.,
Tacoma (2), Washington.

In the Superior Court of the State of Washington,
in and for Clark County

No.....

R. M. PERRIN and MARY PERRIN,

Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA, a Cor-
poration, and C. S. THAYER,

Defendants.

COMPLAINT

Come now plaintiffs and for cause of action
against defendants allege as follows:

I.

Defendant Aluminum Company of America, is
a corporation organized and existing under the
laws of the State of Pennsylvania and at all times
hereinafter mentioned was and is authorized to do
business in the State of Washington. Said de-
fendant since prior to January 1, 1947, has
operated an aluminum reduction factory near
Vancouver, Clark County, Washington.

II.

Defendant C. S. Thayer, was at all times herein
mentioned the manager of said aluminum reduction
factory and had supervision and control over the
operation of said plant.

III.

During the growing season of 1947, plaintiffs were occupying as lessees certain real property located at 80th Avenue and Columbia Boulevard in Multnomah County, Oregon, described as Tax Lot 110, Sec. 17, Township 1 North, Range 2 East of Willamette Meridian, and were engaged in the production of gladioli bulbs and flowers on approximately 27 acres of said property.

IV.

During said growing season, defendants with full knowledge of the injury and damage to be caused thereby and with full knowledge that the installation and operation of an effective gas fume and particulate collecting, washing and scrubbing system would prevent any damage to plaintiffs, knowingly and wilfully produced and deposited upon the property occupied by plaintiffs and upon the gladioli bulbs and flowers planted thereon various noxious gases, fumes and particulates.

V.

Said noxious gases, fumes and particulates so deposited upon the property occupied by plaintiffs and upon plaintiffs' gladioli caused material injury and damage to their gladioli bulbs and flowers and greatly diminished the value thereof, to plaintiffs' damage.

VI.

By reason of the matters hereinbefore alleged, plaintiffs have been damaged in the amount of

\$46,344.41, and thereby defendants by the force of Oregon Compiled Laws Annotated, Sec. 8-406 became liable to pay plaintiffs treble the amount of said damages.

VII.

Oregon Compiled Laws Annotated, Sec. 8-406 provides whenever any person, firm or corporation shall wilfully injure or sever from the land of another any produce thereof, or shall cut down, girdle or otherwise injure, or carry off, any tree, timber or shrub on the land of another person, or of the state, county, United States, or any public or private corporation, or on the street or highway in front of any person's house, or in any village, town or city lot, or cultivated grounds, or on the common or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town, city, the United States, state, county, public or private corporation, against the person, firm or corporation committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed therefor, as the case may be; provided, that in any such action, upon plaintiff's proof of his ownership of the premises and the commission by the defendant of any of the aforesaid mentioned acts, it shall be *prima facie* evidence that such acts were done and committed by defendant wilfully, intentionally and without plaintiff's consent. Oregon Compiled Laws An-

notated, Sec. 8-407 provides if, upon the trial of such action, it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodland for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall be given for double damages. Under Oregon law said statutes give to the party injured by the wrongful act of another, private remedy.

VIII.

Under Oregon law the acts of defendants hereinabove alleged create in plaintiffs a right of action against defendants for injuring personal property by direct force.

IX.

By reason of the foregoing plaintiffs are entitled to punitive damages in the amount of \$92,688.82, one-half of which sum is a reasonable amount to allow plaintiffs as attorneys' fees herein.

Wherefore, plaintiffs demand judgment against the defendants, and each of them, for thrice the amount of the damages suffered by them, for punitive damages in the amount of \$92,688.82, for at-

torneys' fees in the sum of \$46,344.41 and for costs and disbursements.

McLEAN & KLINGBERG,

DAVID E. McLEAN,

/s/ JUDSON T. KLINGBERG,
Of Attorneys for Plaintiffs.

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

JAMES C. DEZENDORF,

ALFRED H. CORBETT,

Of Attorneys for Plaintiffs.

JOHN YERKOVICH,

Of Attorneys for Plaintiffs.

Duly verified.

[Endorsed]: Filed June 23, 1950.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1352

R. M. PERRIN and MARY PERRIN,

Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA, a Cor-
poration, and C. S. THAYER,

Defendants.

PETITION FOR REMOVAL

Petition for Removal of civil action from the Superior Court of the State of Washington in and for Clark County to the District Court of the United States for the Western District of Washington, Southern Division.

To the Honorable Judge of Said District Court of the United States:

Your petitioner, the defendant, Aluminum Company of America, above named, respectfully shows:

I.

That a civil action has been brought and is now pending in the Superior Court of the State of Washington in and for Clark County, a State Court, wherein R. M. Perrin and Mary Perrin are plaintiffs, and your petitioner, Aluminum Company of America, a corporation, and C. S. Thayer, are

defendants, which action is hereinafter referred to as "said action."

II.

That said action is a civil action of which the District Courts of the United States have original jurisdiction, in that said action is one to recover damages for alleged trespass to plaintiffs' property or the gladioli bulbs or flowers planted thereon alleged to have been caused by deposit of gas, fumes and particulates, emanating from defendant Aluminum Company of America's plant near Vancouver, Clark County, Washington, thereon.

III.

That the matter in controversy in said action at the commencement of said action and at the present time exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

IV.

That petitioner hereby petitions to remove said action to this Court upon the ground and for the reason that said action involves a controversy which is wholly between citizens of different states, in that plaintiffs, R. M. Perrin and Mary Perrin, were at the time of the commencement of said action and still are citizens and residents of the State of Oregon; that your petitioner, Aluminum Company of America, a defendant in said action, is a corporation organized and existing under the laws of the State of Pennsylvania and at the time of the commencement of said action was, and still is, a resident of the State of Pennsylvania.

V.

That the said plaintiffs have fraudulently and improperly joined defendant, C. S. Thayer, a resident of the State of Washington, as co-defendant with your petitioner for the sole purpose of avoiding and defeating the jurisdiction of the Courts of the United States and the right of your petitioner to remove this cause to said Court. That defendant, C. S. Thayer, is not now and never has been an officer of defendant corporation, Aluminum Company of America. That since September 17, 1940, defendant, Aluminum Company of America, has been and now is the owner and operator of an aluminum reduction plant near Vancouver, Clark County, Washington. That the design, plans, specifications, construction, alteration or modification of said plant at all times since September 17, 1940, have been and now are within the sole discretion, direction, control and scope of authority of the officers of defendant corporation, but are not and have not been within the discretion, direction, control and scope of authority of defendant, C. S. Thayer. That for more than three years prior to the commencement of said action, defendant, Aluminum Company of America, has at all times had installed and used the most modern and efficient system known to the industry for washing gases, particulates and fluorides from the air emanating from said plant, but that the design, development, construction and operation of such system have been and are solely within the control of the officers of said company, and are not within the control of the

defendant, C. S. Thayer. That the operation of said plant and its system for the prevention of escape of gases, particulates and any other matter are within the control and authority of the officers and directors of defendant, Aluminum Company of America, but are not now and never have been within the control and authority of the defendant, C. S. Thayer. That defendant, C. S. Thayer, has never directed any invasion of plaintiffs' property by authority of defendant, Aluminum Company of America, or otherwise, or by any act of his cause such invasion or consented thereto, or had any personal knowledge thereof or any control there-over. That petitioner is informed and believes, and therefore states, that these facts are well known to the plaintiffs herein. That plaintiffs have joined defendant, C. S. Thayer, as a defendant in said action solely in an endeavor to defeat the right of defendant, Aluminum Company of America, to remove said action to this Court. That the facts in connection therewith are all as more fully set forth in the affidavit of defendant, C. S. Thayer, hereto attached and by this reference made a part hereof.

VI.

The said action was commenced on the 7th day of June, 1950, by service of Summons and Complaint on petitioner.

VII.

Your petitioner herewith presents a good and sufficient bond, as provided by statute, conditioned that your petitioner will pay all costs and disburse-

ments incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Wherefore, petitioner prays that the said action be removed from said State Court into this Court for trial and determination; that this Court accept said bond and make and enter an Order of Removal of said action.

ALUMINUM COMPANY
OF AMERICA,
Petitioner.

WILLIAM H. ECKERT,
FRANK L. SEAMANS,
HUGH L. BIGGS,
WILLIAM W. WYSE,
HILTON B. GARDNER,
Attorneys for Defendant, Aluminum Company of
America.

SMITH, BUCHANAN &
INGERSOLL,
HART, SPENCER,
McCULLOCH, ROCKWOOD
& DAVIES,
METZGER, BLAIR, GARDNER
& BOLDT,
Of Counsel.

State of Washington,
County of Pierce—ss.

Hilton B. Gardner, being first duly sworn, on oath, deposes and says: That your affiant is one of the attorneys for petitioner, and makes this verification for and on its behalf, being duly authorized so to do, upon the ground and for the reason that petitioner is a non-resident and no officer of said corporation is available to verify the same; that your affiant has read the foregoing Petition for Removal, and he believes it to be true.

/s/ HILTON B. GARDNER,

Subscribed and sworn to before me this 23rd day of June, 1950.

[Seal] /s/ JOHN W. BLAIR,
Notary Public in and for the State of Washington,
Residing at Tacoma.

AFFIDAVIT OF C. S. THAYER

State of Washington,
County of Pierce—ss.

C. S. Thayer, of lawful age, being first duly sworn, on his oath, deposes and says: That he is one of the defendants in an action entitled, "R. M. Perrin and Mary Perrin, Plaintiffs, vs. Aluminum Company of America, a corporation, and C. S. Thayer, Defendants," now pending in the Superior Court of the State of Washington in and for the County of Clark. That a copy of the Summons

and Complaint in said action was served upon affiant on the 7th day of June, 1950.

That affiant is not now and has not at any time in the past been an officer or director of defendant, Aluminum Company of America, a corporation. That since September 17, 1940, defendant Aluminum Company of America has been and is now the owner of and has operated and is now operating a manufacturing establishment near Vancouver, in Clark County, State of Washington, which plant has been and is being used by said defendant in the production of aluminum. That affiant had no control over the design or construction of said plant, but that said plant was designed and constructed in accordance with plans and specifications prepared by defendant, Aluminum Company of America, and approved by the officers of said company. That affiant was Works Manager of said plant from the time it started operations until he became Manager, Vancouver Operations, during the past year. That affiant, subject to the control and directions of the officers and directors of said Aluminum Company of America, manages said plant.

That prior to 1946, defendant, Aluminum Company of America, installed an elaborate system of water sprays in the ventilating roof monitors of said plant, which washed from the atmosphere the greater proportion of fluorides emitted from the reduction pots of said plant, and that at the time of the installation of such system, it was the most efficient known to the aluminum industry. That

throughout subsequent years, defendant, Aluminum Company of America, continuously sought to improve its air cleansing system, and at great expenditure of time, effort and money devoted to study, research and experimentation, it has developed a new and even more elaborate and efficient system, which system was installed at said plant during the years 1948 and 1949. Said system includes pot covers, rotoclones and air washing towers. By the installation of said system, the escape of particulates and gases from defendant's plant has been substantially eliminated. That said system is the most elaborate and efficient one so far developed and known to or used in the aluminum industry.

That defendants have never intended to damage plaintiffs' operations or to interfere in any degree whatsoever with plaintiffs' use and enjoyment of their property. The operation of said aluminum reduction plant has not been carried on for the purpose of invading any interest of plaintiffs in and to any of their property. That in fact defendants have not interfered with or invaded any interest in plaintiffs' property directly or indirectly, intentionally or otherwise, by the operation of said plant. That in the reduction of aluminum, some fluorides are necessarily created, and that a very small proportion of such matter unavoidably escapes into the atmosphere from said plant. Such escaping matter is not carried to and deposited on plaintiffs' property or at least not in significant quantities. Neither now nor at any time in the

past has any such matter injuriously affected or impaired the vitality, development, health or saleability of the property occupied by plaintiffs or of the gladioli bulbs and flowers planted thereon.

That the operation of said plant, its construction, alteration and modification, and any and all systems for the prevention of the escape of gases, particulates and other matter are within the control and authority of the officers and directors of defendant, Aluminum Company of America, and are not now and have never been within the control or authority of affiant. That affiant has never directed any invasion of plaintiffs' property or by any act of his caused such an invasion, or consented thereto, or had any personal knowledge thereof.

That affiant is informed and believes, and upon such information and belief states the fact to be, that the facts hereinabove set forth are, and at and prior to the commencement of the above-entitled action were, well known to plaintiffs, and that plaintiffs have joined affiant as a defendant in said action solely in the endeavor to defeat defendant, Aluminum Company of America's right to remove said action.

Further affiant sayeth naught, save and except that this affidavit is made in support of the petition of defendant, Aluminum Company of America, for the removal of said action from the Superior Court of the State of Washington in and for the County of Clark to the United States District Court

for the Western District of Washington, Southern Division.

/s/ C. S. THAYER.

Subscribed and sworn to before me this 23rd day of June, 1950.

[Seal] /s/ JOHN W. BLAIR,
Notary Public in and for the State of Washington,
Residing at Tacoma.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

BOND ON REMOVAL

Know All Men by These Presents that we, Aluminum Company of America, a Pennsylvania corporation, as Principal, and Hartford Accident and Indemnity Company, of Hartford, Connecticut, a Connecticut corporation, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto R. M. Perrin and Mary Perrin, the plaintiffs in the above-entitled cause, their heirs, personal representatives, successors and assigns, in the penal sum of One Thousand Dollars (\$1,000.00), lawful money of the United States of America, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals, and dated this 23rd day of June, 1950.

The conditions of this obligation are such that whereas, the said Aluminum Company of America has filed its petition in the United States District Court in and for the Western District of Washington, Southern Division, for removal of the above cause to said Court from the Superior Court of the State of Washington in and for Clark County;

Now, Therefore, if the said Aluminum Company of America shall well and truly pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed, then this obligation to be void; otherwise to remain in full force and effect.

ALUMINUM COMPANY OF
AMERICA,

By /s/ HILTON B. GARDNER,
Its Attorney.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY of Hartford, Connecticut,

By /s/ [Indistinguishable],
Its Attorney in Fact.

Approved and Accepted this 23 day of June, 1950.

/s/ CHARLES H. LEAVY,
United States District Judge.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

ORDER OF REMOVAL

This matter coming on for hearing this . . . day of June, 1950, before the undersigned Judge of the above-entitled Court, upon the petition of defendant, Aluminum Company of America, for an Order of Removal herein, and it appearing from said petition that said removal is proper, and the Court being fully advised in the premises,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the action entitled, "R. M. Perrin and Mary Perrin, Plaintiffs, vs. Aluminum Company of America, a corporation, and C. S. Thayer, Defendants," now pending in the Superior Court of the State of Washington in and for the County of Clark, be and the same hereby is ordered removed to this Court for trial and determination, and

It Is Further Hereby Ordered that the bond on removal submitted to the Court with said petition be and the same hereby is approved and accepted.

Done in Open Court this 23 day of June, 1950.

/s/ CHARLES H. LEAVY,

United States District Judge.

Presented by:

/s/ HILTON B. GARDNER,

Of Attorneys for Defendant, Aluminum Company of America.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

NOTICE OF REMOVAL

To R. M. Perrin and Mary Perrin, Plaintiffs, and to McLean & Klingberg, David E. McLean, Judson T. Klingberg, Koerner, Young, McCulloch & Dezendorf, James C. Dezendorf, Alfred H. Corbett, and John Yerkovich, their attorneys:

You, and Each of You, will please take notice that on the 23 day of June, 1950, defendant, Aluminum Company of America, filed in the District Court of the United States for the Western District of Washington, Southern Division, its Petition for Removal of the above-entitled case from the Superior Court of the State of Washington in and for the County of Clark to the above-entitled court, together with its Bond for Removal.

Copies of said Petition and Bond are herewith served upon you.

Dated this 23 day of June, 1950.

WILLIAM H. ECKERT,

FRANK L. SEAMANS,

HUGH L. BIGGS,

WILLIAM W. WYSE,

HILTON B. GARDNER,

Attorneys for Defendant, Aluminum Company of America.

Receipt of copy acknowledged.

[Endorsed]: Filed June 26, 1950.

[Title of District Court and Cause.]

ANSWER

For answer to plaintiffs' complaint defendants admit, deny and allege as follows:

I.

Defendants admit the allegations contained in paragraphs I and VII of plaintiffs' complaint.

II.

Answering paragraph II of plaintiffs' complaint, defendants allege that defendant C. S. Thayer was works manager of the reduction works of defendant Aluminum Company of America at Vancouver, Washington, between August 10, 1940, and on or about July 1, 1949, and that since on or about July 1, 1949, he has been the manager of Vancouver operations of defendant Aluminum Company of America. In said capacities he has exercised general supervision and control over some particulars of the operation of said reduction works. Defendants deny the allegations of paragraph II of plaintiffs' complaint except insofar as the same are consistent with defendants' allegations contained herein.

III.

Defendants lack sufficient information to form a belief as to the truth of the allegations contained in paragraph III of plaintiffs' complaint.

IV.

Defendants deny the allegations contained in paragraphs IV, V, VI, VIII and IX of plaintiffs' complaint.

First Affirmative Defense

Defendants allege that plaintiffs' action is barred by the statute of limitations.

Second Affirmative Defense

Defendants allege that the action set forth in plaintiffs' complaint is a local action and that this court lacks jurisdiction of the same.

Wherefore, defendants demand that this action be dismissed and that they have their costs and disbursements incurred herein.

WILLIAM H. ECKERT,

FRANK L. SEAMANS,

HUGH L. BIGGS,

WILLIAM W. WYSE,

HILTON B. GARDNER.

Certificate of Mailing attached.

[Endorsed]: Filed June 29, 1950.

[Title of District Court and Cause.]

MOTION TO REMAND

Comes now the plaintiffs and upon the basis of (1) the facts alleged in the accompanying affidavit of James C. Dezendorf, hereto attached and made a part hereof, and (2) the record and files herein move this Court to remand this cause to the Superior Court of the State of Washington, for Clark County, from which Court it was attempted to be removed to this Court, for the following reasons:

(1) The requisite diversity of citizenship required as a condition precedent to the jurisdiction of this court in a controversy of the character presented by the record in this cause does not exist.

(2) An action in which a resident defendant is a proper party may not be removed; the defendant C. S. Thayer is properly joined; he was served with process prior to the filing of the petition to remove and is a citizen and resident of the State of Washington.

(3) No separate independent claim is stated against either defendant so that neither of them can remove all or any part of this suit or action.

(4) For other reasons apparent upon the face of the record.

Wherefore, plaintiffs pray that this cause may be remanded to the Superior Court of the State of Washington, for Clark County to be there pro-

ceeded with according to the practice governing such cases.

McLEAN & KLINGBERG,

/s/ DAVID E. McLEAN,
Of Attorneys for Plaintiffs.

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

/s/ [Indistinguishable),
Of Attorneys for Plaintiffs.

/s/ JOHN YERKOVICH,
Of Attorneys for Plaintiffs.

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES C. DEZENDORF

State of Oregon,

County of Multnomah—ss.

I, James C. Dezendorf, being first duly sworn, depose and say:

That I am one of the attorneys for plaintiffs in the above action, that the defendant C. S. Thayer resides in Vancouver, Clark County, Washington, and I am informed and believe and therefore assert that he is a citizen of the State of Washington;

That the defendant C. S. Thayer is the Manager of the Vancouver, Washington, ALCOA Reduction Plant being operated by defendant Aluminum Com-

pany of America, and as such Manager the said C. S. Thayer has the supervision and control of the operation thereof and has the right, authority and power to stop the operation of said plant, either wholly or in part.

/s/ JAMES C. DEZENDORF.

Subscribed and sworn to before me this 3rd day of July, 1950.

/s/ VERA SCALES,

Notary Public for Oregon.

My Commission expires 11-6-53.

Certificate of Mailing attached.

[Endorsed]: Filed July 5, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF ROY A. HUNT

Before me, the undersigned authority, personally appeared Roy A. Hunt, who being by me first duly sworn according to law, did depose and say that he is President of the Aluminum Company of America, one of the defendants in the above-entitled action and duly authorized to make this affidavit in its behalf;

That C. S. Thayer, the other defendant in the above-entitled action, does not have, and never has had, the right, authority or power to stop the operation of the defendant's plant near Vancouver, Clark County, Washington;

And that the only person who would have such authority is the affiant himself, as President of the defendant Company acting with the concurrence of Irving W. Wilson, Senior Vice President of said Company, or of Frank L. Magee, Operating Vice President of said Company.

/s/ ROY A. HUNT.

Sworn to and subscribed before me this 10th day of July, 1950.

/s/ JOHN J. DEMSKIE,
Notary Public.

My Commission expires March 7, 1951.

[Endorsed]: Filed July 13, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF R. M. PERRIN

State of Oregon,
County of Multnomah—ss.

I, R. M. Perrin, being duly sworn, depose and say:

That I am a plaintiff in an action instituted in the Superior Court of the State of Washington in and for Clark County by myself and Mary Perrin against Aluminum Company of America and C. S. Thayer.

That Mary Perrin is my mother and that she has an interest in said action.

That Mary Perrin is now, and has, for more than three years, been a resident and citizen of the State of Washington with permanent residence at 5501 N. E. 36th Street, Seattle, Washington.

/s/ R. M. PERRIN.

Subscribed and sworn to before me this 14th day of July, 1950.

[Seal] /s/ HERBERT H. ANDERSON,
Notary Public for Oregon.

My Commission expires Jan. 15, 1954.

[Endorsed]: Filed July 17, 1950.

[Title of District Court and Cause.]

**ORDER DENYING MOTION TO REMAND
AND ENJOINING PLAINTIFFS**

This cause coming on to be heard at this term and being argued by counsel, upon consideration thereof, it is

Ordered, Adjudged and Decreed that the motion of plaintiffs to remand this cause to the Superior Court of the State of Washington in and for Clark County be and the same is hereby denied, and

Upon motion of plaintiffs, It Is Further Ordered, Adjudged and Decreed that plaintiffs, their agents and attorneys, be and they hereby are restrained and enjoined from further prosecuting this action

in the Superior Court of the State of Washington in and for Clark County, to which plaintiff excepts and exception allowed.

Dated Sept. 18, 1950.

/s/ CHARLES H. LEAVY,
United States District Judge.

[Endorsed]: Filed September 18, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendants move the Court for an order dismissing plaintiffs' action and entering judgment for defendants for their costs, on the ground that the pleadings disclose that the plaintiffs' action is barred by the statute of limitations.

WILLIAM H. ECKERT,
FRANK L. SEAMANS,
HUGH L. BIGGS,
WILLIAM W. WYSE,
HILTON B. GARDNER.

[Endorsed]: Filed October 20, 1950.

The United States District Court for the Western
District of Washington, Southern Division

Civil No. 1352

R. M. PERRIN and MARY PERRIN,

Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA and C.
S. THAYER,

Defendants.

JUDGMENT ORDER

This cause regularly came on for hearing on defendants' motion for an order dismissing this action and entering judgment for defendants for their costs on the ground that the pleadings disclose that the plaintiffs' action is barred by the statute of limitations. Plaintiffs appeared by one of their attorneys, James C. Dezendorf; defendants appeared by one of their attorneys, Hilton B. Gardner.

The Court having fully and carefully considered the pleadings, record, briefs and proceedings on the arguments of the motion, concludes that this action was not commenced within the time prescribed by the applicable statute of limitations and therefore should be dismissed with judgment against plaintiffs for defendants' costs in accordance with defendants' motion, and now being fully advised makes the following judgment order:

It Is Considered, Ordered and Adjudged that

this action be and the same hereby is dismissed and that the defendants be and they hereby are granted judgment against plaintiffs for defendants' costs and disbursements incurred herein, taxed at \$15.00.

Done and dated in open court this 8th day of December, 1950.

Exceptions allowed to plaintiff.

/s/ CHARLES H. LEAVY,
United States District Judge.

Approved as to form:

/s/ JAMES A. DEZENDORF,
Of Attorneys for Plaintiffs.

Presented by:

/s/ HILTON B. GARDNER.

Entered December 8, 1950.

[Endorsed]: Filed December 8, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Aluminum Company of America and C. S.
Thayer, defendants above named; and

To William H. Eckert, Frank L. Seamans, Hugh
L. Biggs, William W. Wyse, Hilton B. Gardner,
of their attorneys:

Notice is hereby given that R. M. Perrin and
Mary Perrin, plaintiffs above named, appeal to
the Court of Appeals for the Ninth Circuit from
the order entered in this action on September 18,
1950, and from the judgment order entered in this
action on December 8, 1950.

Dated January 6, 1951.

McLEAN & KLINGBERG,

/s/ JOHN YERKOVICH.

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

Attorneys for Appellants.

Copies mailed Jan. 10, 1951.

[Endorsed]: Filed January 9, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellants intend to rely on this appeal are as follows:

(1) The court erred in denying plaintiffs' motion to remand this cause to the Superior Court of the State of Washington for Clark County, from which court it was attempted to be removed by defendant Aluminum Company of America.

(2) The court erred in dismissing this action on the ground that the pleadings disclose the action is barred by the Statute of Limitations.

McLEAN & KLINGBERG,

/s/ JOHN YERKOVICH.

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

Appellants' Attorneys.

State of Oregon,

County of Multnomah—ss.

I, James C. Dezendorf, being first duly sworn, depose and say: That I am one of attorneys for plaintiffs in the within action; that I served the within Statement of Points upon defendants' attorneys by causing to be deposited in the post office at Portland, Multnomah County, Oregon, on

the 9th day of January, 1950, an envelope, with postage prepaid, addressed to Metzger, Blair, Gardner & Boldt, defendants' attorneys, at their post office address, 523 Tacoma Building, Tacoma, Washington; that said envelope contained a copy of the within Statement of Points, same having been duly certified to by me to be a true and correct copy of the original.

/s/ JAMES C. DEZENDORF.

Subscribed and sworn to before me this 9th day of January, 1951.

[Seal] /s/ OGLESBY H. YOUNG,
Notary Public for Oregon.

My commission expires Jan. 2, 1954.

[Endorsed]: Filed Jan. 10, 1951.

Koerner, Young, McColloch & Dezendorf
Attorneys at Law
800 Pacific Building
Portland 4, Oregon

January 6, 1950

Clerk of the United States District Court,
For the Western District of Washington,
Southern Division,
Federal Courthouse and Post Office Building,
Tacoma, Washington.

Re: Perrin v. Aluminum Company of Amer-
ica Number 1352.

Dear Sir:

Enclosed herewith for filing are Notice of Appeal in the above case and Bond for Costs on Appeal.

Enclosed also are copies thereof so that you may give notice to the defendants of the filing thereof.

The Bond for Costs on Appeal has been served upon defendants' attorneys in accordance with the certificate attached to the original bond.

Very truly yours,

/s/ JAMES C. DEZENDORF.

cc—Metzger, Blair, Gardner & Boldt, Attorneys at Law, Tacoma Building, Tacoma, Washington.
Hart, Spencer, McCulloch, Rockwood & Davies, Attorneys at Law, 1410 Yeon Building, Portland 4, Oregon.

[Stamped]: Received Jan. 9, 1951, Office of Clerk, U. S. District Court.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, that we, R. M. Perrin and Mary Perrin, as principals, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto Aluminum Company of America and C. S. Thayer in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said Aluminum Company of America and C. S. Thayer, their successors, executors, administrators and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 6th day of January, 1951.

Whereas, on September 18, 1950, and on December 8, 1950, in an action depending in the United States District Court for the Western District of Washington, Southern Division, between R. M. Perrin and Mary Perrin as plaintiffs and Aluminum Company of America and C. S. Thayer as defendants, an order and a judgment order, respectively, were entered against the said R. M. Perrin and Mary Perrin and the said R. M. Perrin and Mary Perrin having filed a notice of appeal from such order and from such judgment order to the United States Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such, that

if the said R. M. Perrin and Mary Perrin shall prosecute their appeal to effect and shall pay costs if the appeal is dismissed or the order and judgment order are affirmed, or such costs as the said Court of Appeals may award against the said R. M. Perrin and Mary Perrin if the judgment is modified or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

R. M. PERRIN, and

MARY PERRIN,

Appellants.

By /s/ JAMES C. DEZENDORF,

Of Attorneys for Appellants.

FIDELITY & DEPOSIT

COMPANY OF MARYLAND,

By /s/ CLARENCE D. PORTER,

Attorney in Fact.

Countersigned at Vancouver, Washington.

By /s/ P. M. ELWELL,

Resident Agent.

Certificate of Mailing attached.

[Endorsed]: Filed January 9, 1951.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1352

R. M. PERRIN and MARY PERRIN,

Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA, and
C. S. THAYER,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Transcript of Ex Parte proceedings had in the
above-entitled and numbered cause, in the above-
entitled court, before the Honorable Charles H.
Leavy, United States District Judge, at Tacoma,
Washington, on the 1st day of February, 1951.

Appearances:

JAMES C. DEZENDORF, ESQ., of

KOERNER, YOUNG, McCOLLOCH and
DEZENDORF,

800 Pacific Building,
Portland 4, Oregon,

Appeared for Plaintiffs;

HILTON B. GARDNER, ESQ., of
METZGER, BLAIR, GARDNER, and
BOLDT,

Tacoma Building,
Tacoma, Washington,

Appeared on Behalf of Defendants.

The Court: Are there any *ex parte* matters now before we take up the call of the calendar?

Mr. Dezendorf: If it please the Court, in the matter of Perrin vs. Aluminum Company of America, Number 1352, I have asked Mr. Gardner to appear here this morning in connection with a motion to extend the time for filing the record and documents in appeal which I would like to present to the Court at this time.

As the Court knows, under the rules the District Court has the right to extend the time for docketing the appeal in the Circuit Court of Appeals within a period of ninety days within the filing of notice of appeal.

I am asking for an order extending the time within which to file and docket the appeal to April 2, 1951. The reason for the request is that we are engaged now, and will be continually engaged, in the trial of cases in our Court in Portland until approximately the first of April and we would like the Court's consideration in giving us the additional time.

After the motion was prepared I was advised by counsel for the Aluminum Company that the notice of appeal was not filed by the Clerk of this Court

until the 9th day of January, 1951. In that connection the notice of appeal and bond were mailed by me at the main post office in Portland, Oregon, at ten minutes past twelve (12:10) on Saturday, January 6, 1951.

As the Court probably knows, there are four trains a day carrying mail from Portland to Tacoma and points north. The latest time that the notice of appeal should have arrived in the Post Office in Tacoma was Sunday, January 7th. In inquiring at the Clerk's Office, I have been unable to find any reason why the notice of appeal and bond were not received and filed on Monday, January 8th. There is, however, one possible explanation which was given to me by the Deputy Clerk this morning, which is that the Clerk's Office does not always pick up the mail in the afternoon from the box in the Post Office. That could have accounted for the fact that the notice of appeal and bond might have come in and have been placed in the box on Monday afternoon, January 8th, but was not actually picked up by the Clerk on that afternoon.

I have——

The Court: Well, is January 9th beyond the time fixed for appeal?

Mr. Dezendorf: It may be. The judgment was docketed on the 8th day of December, 1950.

The Court: Yes, it would be.

Mr. Dezendorf: I take it, however, that the question as to whether the notice of appeal was timely filed will probably be ruled on by the Court of Appeals probably on either a motion to dismiss

the appeal filed by the Respondent, or when the Court tests its own jurisdiction to hear the questions attempted to be raised by the appeal.

The Court: There is nothing in this record to support your statement, that is, by way of an affidavit or pleading, is there?

Mr. Dezendorf: There is the certificate of service which appears on the bond. I did not know that this question was involved until just a day or two ago and, therefore, I did not designate for an inclusion in the record on appeal the bond on appeal. It is my intention to now file a supplementary declaration designating the original bond on appeal and the record on this hearing in the hope that that will put the facts before the Appellate Court.

Mr. Gardner: I have nothing to add, your Honor, to what Mr. Dezendorf said except this: That it is our intention to move for dismissal of this appeal and, in the event the Court, in the exercise of its discretion, permits the additional time for the filing of the record, it is further our intention to take it up on short record with a motion for dismissal prior to the expiration of that time so that the question may be determined.

The Court: Mr. Clerk, you have no independent recollection of——

The Clerk: No, your Honor, I don't. If it had been in the box down there on Monday morning it would have borne the file date of the 8th and as we said, there is a possibility that it could have come in during Monday and we do not make a practice of going down every day. Usually we do,

but there is a possibility that the mail wasn't picked up in the afternoon. In fact, there is hardly ever any mail in the afternoon and that is why we don't go down. But, if it did come in Monday afternoon, it was opened Tuesday—it would have been in our Tuesday mornings' mail, and that is when it was opened. If it had been in the box Monday morning, it would have been filed as of Monday.

The Court: You don't have the envelope?

The Clerk: No, we didn't realize that time was involved until Mr. Gardner came in a couple of days after that; and we filed it on the 9th. We didn't realize that the time was so close.

The Court: Generally, I want to state that it is very important that you pick up your mail twice a day and see that these documents get in the record as timely as possible because of the very situation that we have here now. I don't think that I am called upon to determine the question of whether notice of appeal has been timely served. However, I think I shall grant your extension. I think to do otherwise under the statement here would be assuming an authority that I perhaps haven't got.

I can see how this question might arise again in the Appellate Court and granting this extension, I do it with the distinct understanding that it shall not stop the Defendants from raising the issue again in the Appellate Court, and, doubtless, there will be proof in the form of affidavits concerning the mailing of the notice and concerning the time it

should have been received. If it were received on the 8th it is granted it is timely. Is that right, Mr. Gardner?

Mr. Gardner: I believe that is right.

The Court: Or, if the failure to file were due to some fault on the part of the Clerk, it is doubtless that that rule permits the finding that it was timely filed if it actually came to the Clerk's Office on the 8th. But, I am not going to determine that. I think I shall just grant the extension with the understanding that it does not prejudice the Defendant in raising that issue in the Appellate Court.

Mr. Dezendorf: Thank you, your Honor.

(Whereupon, other matters were considered.)

Certificate

I, Earl V. Halvorson, official reporter for the within-entitled court, hereby certify that the foregoing is a full and complete transcript of matters therein set forth.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed February 13, 1951.

[Title of District Court and Cause.]

ORDER

Based upon the appellants' motion heretofore filed herein and the court being fully advised,

It Is Hereby Ordered that the time within which the Record on Appeal herein may be filed and the appeal docketed in the Court of Appeals be and the same hereby is extended to April 2, 1951.

Dated at Tacoma, Washington, this 1st day of February, 1951.

/s/ CHARLES H. LEAVY,
District Judge.

[Endorsed]: Filed February 1, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES C. DEZENDORF

State of Oregon,
County of Multnomah—ss.

I, James C. Dezendorf, being first duly sworn, depose and say:

That I am one of the attorneys for plaintiffs-appellants in this action; that I prepared the notice of appeal and bond on appeal in this action on Saturday morning, January 6, 1951; that after the bond was executed by the surety company, I wrote a letter to the Clerk of the United States District Court for the Western District of Washington,

Southern Division, with which I enclosed the original notice of appeal and copies for use by the Clerk in notifying the attorneys for the defendants of the filing of the notice of appeal, and I attached a certificate of service of the bond to the original bond on appeal;

That I enclosed the letter to the clerk, the original and copies of the notice of appeal and the original bond on appeal in an envelope, properly addressed to the Clerk of the United States District Court for the Western District of Washington, Southern Division, United States District Court House and Post Office Building, Tacoma, Washington, and I personally placed on said envelope more than the required amount of stamps to insure the delivery of said envelope to the Clerk at Tacoma, and at 12:10 p.m. on Saturday, January 6, 1951, I personally deposited said envelope in the mail chute at the Main Post Office in Portland, Oregon; that at the same time, I also deposited in said mail chute a carbon copy of said letter of January 6 to the Clerk, together with a certified copy of bond on appeal, which copies were contained in an envelope with proper postage stamps attached addressed to Metzger, Blair, Gardner & Boldt, Tacoma counsel for defendants-respondents, Tacoma Building, Tacoma, Washington;

That thereafter, I received a letter from the Deputy Clerk of the United States District Court for the Western District of Washington, Southern Division, acknowledging receipt of the notice of appeal and bond on appeal, but the date of receipt was not mentioned in the letter;

That approximately two weeks ago I was advised by the Portland counsel for the defendants-respondents that the copy of the notice of appeal which they had received bore the filing date of January 9, 1951, which was the Tuesday following Saturday, January 6, 1951, on which date the notice of appeal and bond on appeal had been mailed to the Clerk at Tacoma;

That immediately after being advised that the copy of the notice of appeal bore the filing date of January 9, 1951, I talked with the Superintendent of Mails at the Main Post Office in Portland, Oregon, and I was advised by him that the letter containing the notice of appeal and bond which I mailed at the Main Post Office on Saturday, January 6, 1951, at 12:10 p.m., should have been placed on board Train 459, which left Portland for Tacoma and Seattle at 5 p.m. on said date, and that it should have arrived at the main post office in Tacoma at approximately 8 p.m. on Saturday, January 6, 1951;

That the Superintendent of Mails at Portland advised me further that there are five northbound trains a day which carry mail to Tacoma, which leave Portland as follows:

Train Number 457	Departure Time 8:00 a.m.
403	8:30 a.m.
407	10:00 a.m.
459	5:00 p.m.
401	11:30 p.m.

That the Superintendent of Mails at Portland

further advised me that the dispatching department of the Main Post Office operates 24 hours a day, 7 days a week, and that this department handles the transmission of mail from the letter drops at the Main Post Office to the trains departing from the railroad station in Portland;

That on February 1, 1951, I talked with the Superintendent of Mails at the Main Post Office in Tacoma, Washington, and I was advised by him that mail arriving in Tacoma on Train 459 from Portland was received at the post office at approximately 8 p.m.; that mail arriving from Portland on Trains 457, 403 and 407 arrived at the post office at 2:30 p.m., and that mail arriving in Tacoma from Portland on Train 401 arrives at the post office at 6 a.m.; that the office of the Clerk of the United States District Court for the Western District of Washington, Southern Division, has a post office box in the main post office in Tacoma into which all arriving mail is immediately deposited;

That on Thursday, February 1, 1951, I talked to E. E. Redmayne, Deputy Clerk of the United States District Court for the Western District of Washington, Southern Division, at the Clerk's office in the main post office building in Tacoma, Washington, and inquired when the notice of appeal and bond on appeal in this action, which were enclosed with my letter of January 6, 1951, were received; that I was informed that they must have arrived at the Clerk's office on Tuesday, January 9, 1951, since that is the date they were filed; that

I was further informed that while mail is deposited in the Clerk's post office box in the main post office several times each day, the Clerk's office has been in the habit of only picking up the mail deposited in said post office box in the morning, and that if my letter of January 6 enclosing the notice of appeal and bond on appeal had been placed in the Clerk's post office box after the mail was first picked up on the morning of Monday, January 8, 1951, it would not have been picked up until the next morning, which was Tuesday, January 9, 1951.

/s/ JAMES C. DEZENDORF.

Subscribed and sworn to before me this 3rd day of February, 1951.

[Seal] /s/ J. ELLIOTT BUSEY,
Notary Public for Oregon.

My Commission expires Dec. 25, 1953.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 14, 1951.

In the United States District Court for the Western
District of Washington, Southern Division
Civil No. 1352

R. M. PERRIN and MARY PERRIN,
Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA and
C. S. THAYER,
Defendants.

JUDGMENT ON MANDATE

This cause came on regularly for hearing upon motion of defendants for judgment upon mandate of the United States Court of Appeals for the Ninth Circuit, and it appearing to the Court that on the 14th day of May, 1951, the United States Court of Appeals for the Ninth Circuit did issue its mandate, which was entered of record herein on the 17th day of May, 1951, in words and figures substantially as follows:

“United States of America—SS:

“THE PRESIDENT OF THE UNITED
STATES OF AMERICA

“To the Honorable, the Judges of the United States District Court for the Western District of Washington, Southern Division, Greeting:

“Whereas, lately in the United States District Court for the Western District of Washington, Southern Division, before you or some of you, in a cause between R. M. Perrin and Mary Perrin, plaintiffs and Aluminum Company of America and C. S. Thayer, defendants, No. 1352, a judgment order was duly filed and entered on the 8th day of December, 1950, which said judgment order is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof;

“And Whereas, the said R. M. Perrin, et al., appealed to this court as by the inspection of the

transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

“And Whereas, on the 9th day of April, in the year of our Lord, one thousand nine hundred and fifty-one, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and upon motion of appellee for dismissal of appeal herein and was duly submitted:

“On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be, and hereby is granted and that the appeal in this cause be, and hereby is, dismissed. (April 9, 1951.)

“(On Reverse Side)

“You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

“Witness the Honorable Fred M. Vinson, Chief Justice of the United States, the fourteenth day of May in the year of our Lord one thousand nine hundred and fifty-one.

“[Seal] /s/ PAUL P. O'BRIEN,

“Clerk, United States Court of Appeals for the Ninth Circuit.”

“United States Court of Appeals
for the Ninth Circuit

“No. 12890

“R. M. PERRIN, et al.,

“vs.

“ALUMINUM COMPANY OF AMERICA.

“MANDATE

“Let the within Mandate be entered this 17th day of May, 1951.

“/s/ C. E. BEAUMONT,

“United States District Judge.

“[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, May 17, 1951.

“MILLARD P. THOMAS,

“Clerk.

“By E. R.,

“Deputy.”

Now, Therefore, pursuant to and in accordance with said mandate, it is hereby

Considered, Ordered and Adjudged that the appeal from the judgment of this court entered on the 8th day of December, 1950, having been dismissed, said judgment is in all matters and things affirmed.

Done and dated at Tacoma, Washington, this 8th day of June, 1951.

/s/ CHARLES H. LEAVY,
United States District Judge.

Approved as to Form:

/s/ JAMES C. DEZENDORF,
Of Attorneys for Plaintiffs..

Presented by:

HILTON B. GARDNER,
Of Attorneys for Defendants.

Service of Copy acknowledged.

[Endorsed]: Filed June 8, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Aluminum Company of America and C. S. Thayer, defendants; and William H. Eckert, Frank L. Seamans, Hugh L. Biggs, William W. Wyse and Hilton S. Gardner, their attorneys:

Please Take Notice that the undersigned will bring the above motion to vacate order and to remand on for hearing before this Court in the United States Court House in the City of Tacoma, Washington, on the 23rd day of July, 1951, at 9:30

o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

/s/ HERBERT H. ANDERSON,

/s/ JOHN YERKOVICH,

McLEAN & KLINGBERG,
Attorneys for Plaintiffs.

To the Clerk of the United States District Court
for the Western District of Washington, Southern
Division:

Please set the foregoing motion to vacate order
and remand for hearing at 9:30 o'clock a.m. on the
23rd day of July, 1951.

/s/ JAMES C. DEZENDORF,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause.]

MOTION TO VACATE

Plaintiffs move the court to vacate and set aside the order entered in this action on September 18, 1950, denying plaintiffs' motion to remand, to vacate and set aside the judgment entered in this

action on December 8, 1950, and to vacate and set aside the judgment entered in this action on June 8, 1951, and to remand this case to the Superior Court of the State of Washington in and for Clark County.

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

/s/ HERBERT H. ANDERSON,

/s/ JOHN YERKOVICH,

McLEAN & KLINGBERG,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO VACATE

The above-entitled action having come on regularly for hearing before the above-entitled Court on the 1st day of August, 1951, upon plaintiffs' motion to: (a) vacate and set aside the order entered in the above-entitled action on September 18, 1950, denying plaintiffs' motion to remand; (b) vacate and set aside the judgment entered in the above-entitled action on December 8, 1950; (c) vacate and set aside the judgment entered in the above-entitled action on June 8, 1951; and (d) remand the above-entitled action to the Superior Court of the State of Washington in and for Clark

County; the plaintiffs appearing by Herbert H. Anderson, of their attorneys of record, and the defendants appearing by Hugh L. Biggs and Hilton B. Gardner, of their attorneys of record; and the Court having heard the argument of counsel and having considered said motion, and being fully advised in the premises,

Now, Therefore, It Is Ordered, Adjudged and Decreed that the motion of plaintiffs to: (a) vacate and set aside the order entered in the above-entitled action on September 18, 1950, denying plaintiffs' motion to remand; (b) vacate and set aside the judgment entered in the above-entitled action on December 8, 1950; (c) vacate and set aside the judgment entered in the above-entitled action on June 8, 1951; and (d) remand the above-entitled action to the Superior Court of the State of Washington in and for Clark County, be and the same, and each and every part thereof, is hereby denied.

To which action of the Court, plaintiffs except, and the exception is allowed.

Dated this 3rd day of August, 1951.

/s/ J. FRANK McLAUGHLIN,
United States District Judge,
Sitting by Assignment.

Presented by:

/s/ HILTON B. GARDNER,
Of Attorneys for Defendants.

[Endorsed]: Filed August 3, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Aluminum Company of America and C. S. Thayer, defendants above named; and

To William H. Eckert, Frank L. Seamans, Hugh L. Biggs, William W. Wyse, Hilton B. Gardner, of their attorneys:

Notice is hereby given that R. M. Perrin and Mary Perrin, plaintiffs above named, appeal to the Court of Appeals for the Ninth Circuit from the Order entered in this action on August 3, 1951.

Dated this 23rd day of August, 1951.

McLEAN & KLINGBERG,
/s/ JOHN YERKOVICH,

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,
/s/ JAMES C. DEZENDORF,
/s/ HERBERT H. ANDERSON,
Attorneys for Appellants.

Copies Mailed Aug. 27, 1951.

[Endorsed]: Filed August 25, 1951.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, that we, R. M. Perrin and Mary Perrin, as principals, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto Aluminum Company of America and C. S. Thayer in the full and just sum of Two Hundred Fifty (\$250.00) Dollars to be paid to the said Aluminum Company of America and C. S. Thayer, their successors, executors, administrators and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of August, 1951.

Whereas, on August 3, 1951, in an action depending in the United States District Court for the Western District of Washington, Southern Division, between R. M. Perrin and Mary Perrin as plaintiffs and Aluminum Company of America and C. S. Thayer as defendants, an Order was entered against the said R. M. Perrin and Mary Perrin and the said R. M. Perrin and Mary Perrin having filed a notice of appeal from such Order to the United States Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such, that if the said R. M. Perrin and Mary Perrin shall prosecute their appeal to effect and shall pay costs if the appeal is dismissed or the Order is affirmed,

or such costs as the said Court of Appeals may award against the said R. M. Perrin and Mary Perrin if the Order is modified or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

R. M. PERRIN, and

MARY PERRIN,

Appellants.

By /s/ HERBERT H. ANDERSON,
Of Attorneys for Appellants.

[Seal] FIDELITY & DEPOSIT COM-
PANY OF MARYLAND,

By /s/ JEAN J. KAMSTRA,
Attorney in Fact.

Countersigned at Vancouver, Washington.

P. M. ELWELL AGENCY,

By /s/ P. M. ELWELL,
Resident Agent.

Certificate of Mailing attached.

[Endorsed]: Filed August 25, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS .

The points upon which appellant intends to rely on this appeal are as follows:

The court erred in denying plaintiffs' motion (1) to vacate and set aside the order entered in this action on September 18, 1950; (2) to vacate and set aside the judgment entered in this action on December 8, 1950; and (3) to vacate and set aside the judgment entered in this action on June 8, 1951, and in refusing to remand this case to the Superior Court of the State of Washington in and for Clark County.

McLEAN & KLINGBERG,

/s/ JOHN YERKOVICH,

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

/s/ HERBERT H. ANDERSON,

Appellants' Attorneys.

Receipt of Copy acknowledged. .

[Endorsed]: Filed September 12, 1951.

[Title of District Court and Cause.]

TRANSCRIPT OF DOCKET ENTRIES

1950

June 23—Filed Pet. for Removal from Sup. Ct.,
Clark Co.—(1)

June 23—Filed Bond on Removal (\$1000)—(2)

June 23—Filed Order of Removal—(3)

June 23—Filed Sum. & Complaint (from Sup. Ct.)
(4)

June 23—Filed Notice of Removal—(5)

June 29—Filed Answer—(6)

July 5—Filed Motion, Pltf., to Remand—(7)

July 5—Filed Notice—(8)

July 5—Set for trial Dec. 5 (Court)

July 13—Filed Affid., Roy A. Hunt, Pres. of deft.
corp.—(9)

July 17—Filed Affid., R. M. Perrin—(10)

July 17—Motion Remand passed 1 wk.

July 31—Filed Pltfs.' Memo re Motion Remand—
(11)

July 31—Ent'd record hearing Motion Remand—
denied; written order requested.

Sept. 18—Ent'd record hearing oral Motion to in-
clude injunc. relief in Order Deny. Motion
to Remand—granted.

Sept. 18—Filed and Ent. Order Deny. Motion Re-
mand and Enjoin. Pltfs. from prosec.
action in Sup Ct. (COB 10, 1234)—(12)

Oct. 20—Filed Motion, defts., to Dismiss, with costs
to defts.—(13)

Nov. 10—Filed Defts.' Memo re Stat. of Limit.
—(14)

1950

- Nov. 10—Filed Note of Issue (Hear. Defts' Mot. for Judgm) (11/20)—(15)
- Nov. 10—Filed Affid. service—(16)
- Nov. 18—Filed Plfts'. Memorandum on Statute of Limitations—(17)
- Nov. 20—Ent'd record hearing Motion, defts., to Dismiss-sustained; exception allowed.
- Nov. 27—Filed Reporter's Transcript of Hearing (11/20/50)—(18)
- Dec. 8—Filed & Ent. Judgm. Order: Action dismissed; defts. to recover costs \$15 (COB 11, 179)—(19)

1951

- Jan. 9—Filed Motion, Pltfs., of Appeal—Copies sent counsel for defts—(20)
- Jan. 9—Filed Bond for Costs on Appeal—(21)
- Jan. 10—Filed Statement of Points—(22)
- Jan. 10—Filed Designation of Record, Pltfs.—(23)
- Jan. 17—Filed Designation of Addl. Portions of Record (Defts.)—(24)
- Jan. 17—Filed Reporter's Transcript (of 11/20/50) (same as Item 18 supra)—(25)
- Feb. 1—Filed Motion, Plft., extend time file appeal—(26)
- Feb. 1—Filed & Ent. Order Extend Time (to 4/2/51) to File Record on Appeal (COB 11, 280)—(27)
- Feb. 14—Filed Affid. Dezendorf—(28)
- Feb. 14—Filed Designation, defts., of Addl. Portions of Record—(29)

1951

- Feb. 13—Reporter's Transcript of Proceedings (of 2/1/51)—(30)
- Feb. 19—Filed Designation, defts., of Contents of Record on Appeal (per Rule 75j FRCP)—(31)
- Feb. 19—Filed Designation, Pltfs., of Addl. Portions of Record for inclusion in Record for Prelim. Hearing—(32)
- Mar. 6—Record on Appeal for Preliminary Hearing for Order of Dismissal sent. Cir. Ct.
- Mar. 28—Record on Appeal from Judgm. Order of Dist. Ct. sent Cir. Ct.
- May 17—Filed and entered Mandate (Appellees' Mot. to Dis. granted)—(33)
- June 8—Filed & Ent'd Judgm. on Mandate (Judgm. of Dist. Court affirmed)—(34)
- July 17—Filed Motion, Pltfs., to Vacate Order of 9/18/50 & Judgm. of 6/8/51 & to Remand to Sup. Ct.—(35)
- July 17—Filed Pltfs' Memo in sup. Mot. to Vacate—(36)
- July 17—Filed Notice (7/23)—passed to 8/1—(37)
- July 30—Filed Memo of Defts. in oppos. Motion to Vacate Judgments & to Remand to State Court—(38)
- Aug. 1—Filed Pltfs., Suppl. Memo—(38a)
- Aug. 1—Ent. record hear. Motion of Pltfs. to Vacate Judgments & to Remand—denied.
- Aug. 3—Filed & Ent. Order deny. Mot. to Vacate Judgments & to Remand to State Court (COB 11, 602)—(39)

1951

Aug. 25—Filed Notice, Pltfs., of Appeal (\$5.00)—
(40)

Aug. 25—Filed Bond on Appeal—(41)

Sept. 12—Filed Statement of Pts., Appellants—(42)

Sept. 12—Filed Designation of Record on Appeal—
(43)

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO
RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and of Subdivision 1 of Rule 11 as amended, of the United States Court of Appeals for the Ninth Circuit I am transmitting herewith all of the original papers and pleadings filed in the above-entitled cause, together with a transcript of the docket entries, included in which are the papers, pleadings and docket entries as required by the Designation of the Record on Appeal of Plaintiffs-Appellants, and the same constitutes the Record on Appeal from that certain Order of the above-entitled Court, filed and entered on August 3, 1951, to the United States Court of Appeals for

the Ninth Circuit at San Francisco. The papers herewith enclosed are identified as follows:

1. Petition for Removal (filed June 23, 1950).
2. Order of Removal (filed June 23, 1950).
3. Bond on Removal (filed June 23, 1950).
4. Summons and Complaint, from Superior Court (filed June 23, 1950).
5. Notice of Removal (filed June 26, 1950).
6. Answer (filed June 29, 1950).
7. Motion to Remand (filed July 5, 1950).
8. Notice of Motion (filed July 5, 1950).
9. Affidavit of Roy A. Hunt (filed July 13, 1950).
10. Affidavit of R. M. Perrin (filed July 17, 1950).
11. Plaintiffs' Memorandum (filed July 31, 1950).
12. Order Denying Motion to Remand and Enjoining Plaintiffs (filed and entered Sept. 18, 1950).
13. Motion for Order of Dismissal (filed Oct. 20, 1950).
14. Defendants' Memorandum on Statute of Limitations (filed Nov. 10, 1950).
15. Notice of Issue (filed Nov. 10, 1950).
16. Affidavit of Service (filed Nov. 10, 1950).
17. Plaintiffs' Memorandum on Statute of Limitations (filed Nov. 18, 1950).
18. Reporter's Transcript of hearing 11/20/50 (filed Nov. 27, 1950).
19. Judgment Order (filed and entered Dec. 8, 1950).
20. Plaintiffs' Notice of Appeal (filed Jan. 9,

1951), with letter of transmittal from James C. Dezendorf to Clerk U. S. Dist. Court at Tacoma, dated Jan. 6, 1951, and marked "received Jan. 9, 1951."

21. Bond for Costs on Appeal (filed Jan. 9, 1951).

22. Statement of Points (filed Jan. 10, 1951).

23. Plaintiffs' Designation of Record (filed Jan. 10, 1951).

24. Defendants' Designation of Additional Portions of Record (filed Jan. 17, 1951).

25. (Copy of Transcript referred to as Item 18 *supra*).

26. Motion to Extend Time to File Appeal (filed Feb. 1, 1951).

27. Order Extending Time to File Record on Appeal (filed Feb. 1, 1951).

28. Affidavit of James C. Dezendorf (filed Feb. 14, 1951).

29. Defendants' Designation of Additional Portions of Record (filed Feb. 14, 1951).

30. Reporter's Transcript of Proceedings of 2/1/51 (filed Feb. 14, 1951).

31. Designation of Record for Preliminary Hearing (filed Feb. 19, 1951).

32. Designation for Additional Portions of Record for Preliminary Hearing (filed Feb. 19, 1951).

33. Mandate of Circuit Court (filed and entered May 17, 1951).

34. Judgment on Mandate (filed and entered June 8, 1951).

35. Motion to Vacate Order, etc., (filed July 17, 1951).
36. Memorandum in Support of Motion (filed July 17, 1951).
37. Notice of Motion (filed July 17, 1951).
38. Memorandum in Opposition to Motion to Vacate (filed July 30, 1951).
- 38a. Plaintiffs' Supplementary Memorandum (filed Aug. 1, 1951).
39. Order Denying Motion to Vacate Order, etc., (filed and entered Aug. 3, 1951).
40. Plaintiffs' Notice of Appeal (filed Aug. 25, 1951).
41. Bond on Appeal (filed Aug. 25, 1951).
42. Statement of Points (filed Sept. 12, 1951).
43. Designation of Record on Appeal (filed Sept. 12, 1951).

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of Appellants for the preparation of the Record on Appeal in this cause, to wit: Notice of Appeal, \$5.00, and that the said amount was paid on August 25, 1951.

In Witness Whereof I have hereunto set my hand and affixed the official seal of the said District Court at Tacoma, Washington, this 24th day of September, 1951.

MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 13115. United States Court of Appeals for the Ninth Circuit. R. M. Perrin and Mary Perrin, Appellants, vs. Aluminum Company of America and C. S. Thayer, Appellees. Transcript of Record. Appeal from the United States District Court, for the Western District of Washington, Southern Division.

Filed September 27, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13115

R. M. PERRIN and MARY PERRIN,
Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA and
C. S. THAYER,
Defendants

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

The court erred in denying plaintiffs' motion (1) to vacate and set aside the order entered in this action on Septemeber 18, 1950; (2) to vacate and set aside the judgment entered in this action on December 8, 1950; and (3) to vacate and set aside the judgment entered in this action on June 8, 1951, and in refusing to remand this case to the Superior Court of the State of Washington in and for Clark County.

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,
/s/ JAMES C. DEZENDORF,
/s/ HERBERT H. ANDERSON,
McLEAN & KLINGBERG,
/s/ JOHN YERKOVICH,
Appellants' Attorneys.

[Endorsed]: Filed October 4, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant designates the following portions of the record to be contained in the record on appeal in this action:

1. Complaint.
2. Notice of Removal.
3. Petition for Removal.
4. Bond on Removal.
5. Order of Removal.
6. Answer.
7. Motion to Remand.
8. Affidavit of Roy A. Hunt.
9. Affidavit of C. S. Thayer.
10. Affidavit of R. M. Perrin.
11. Findings of Fact and Conclusions of Law on Motion to Remand (if any).
12. Order Denying Motion to Remand.
13. Motion to Dismiss.
14. Judgment Order.
15. Notice of Appeal.
16. Statement of Points.
17. Letter of January 6, 1951, to the Clerk enclosing notice of appeal and bond on appeal.
18. Bond of appeal.
19. Transcript of stenographic notes of hearing before the Honorable Charles H. Leavy, United States District Judge at Tacoma, Washington, on the first day of February, 1951.
20. Order of February 1, 1951, extending the

time within which the record herein shall be filed and the appeal docketed in the Court of Appeals to April 2, 1951.

21. Affidavit of James C. Dezendorf in connection with the mailing of the notice of appeal and bond on appeal.

22. All entries in the Clerk's Civil Docket No. 7, Pages 119 and 120, relating to this action.

23. Judgment on Mandate.

24. Motion to Vacate.

25. Notice of Motion.

26. Order Denying Motion to Vacate.

27. Notice of Appeal.

28. Bond on Appeal.

29. Statement of Points on which Appellant Intends to Rely.

30. Clerk's Certificate to Record on Appeal.

31. This Designation.

KOERNER, YOUNG,

McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,

/s/ HERBERT H. ANDERSON,

McLEAN & KLINGBERG,

/s/ JOHN YERKOVICH,

Appellants' Attorneys.

[Endorsed]: Filed October 4, 1951.

No. 13115

In The
United States Court of Appeals
For the Ninth Circuit

R. M. PERRIN and MARY PERRIN, *Appellants,*

vs.

ALUMINUM COMPANY OF AMERICA and
C. S. THAYER,
Appellees.

Brief of Appellant

Appeal from the United States District Court for the
Western District of Washington, Southern Division.

KOERNER, YOUNG, MCCOLLOCH & DEZENDORF,
JAMES C. DEZENDORF,
HERBERT H. ANDERSON,
800 Pacific Building, Portland 4, Oregon.

JOHN YERKOVICH,
Jackson Tower, Portland 4, Oregon.

MCLEAN & KLINGBERG,
Long-Bell Building, Longview, Washington,
Attorneys for Appellants.

FILED

JAN - 3 1952

PAUL P. O'BRIEN

CLERK

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In the
United States Court of Appeals
For the Ninth Circuit

R. M. PERRIN and MARY PERRIN, *Appellants*,

vs.

ALUMINUM COMPANY OF AMERICA and
C. S. THAYER,
Appellees.

Appeal from the United States District Court for the
Western District of Washington, Southern Division.

Brief of Appellant

JURISDICTIONAL STATEMENT

This is an action in tort commenced in the Superior Court of the State of Washington in and for Clark County by R. M. Perrin, a citizen and resident of Oregon, and Mary Perrin, a citizen and resident of Washington, against Aluminum Company of America, a corporation created under the laws of Pennsylvania and a citizen and resident of that state, and C. S. Thayer, a citizen and resident of Washington. The amount in controversy, after excluding interest and costs, exceeds the sum of \$3000.00 (R 3-5).

The action was removed to the United States District Court for the Western District of Washington, Southern Division (R-19) and an order was entered in the District Court denying plaintiffs' motion to remand (R-27). Judgment was entered in favor of defendants on their motion to dismiss the action on the ground that it was barred by the statute of limitations (R 29). Plaintiffs' appeal to this Court was dismissed (R 48, 49) and judgment on the Mandate was entered in the District Court (R 48). An order was thereafter entered in the District Court denying plaintiffs' motion to vacate the order denying remand, the final judgment and the judgment on the mandate (R 53). From that order this appeal has been taken to this Court (R 55) which has jurisdiction of the appeal under 62 Stat. 929, 28 U.S.C.A., Sec. 1291 (1948).

STATEMENT OF THE CASE

Plaintiffs commenced this action in the Superior Court of the State of Washington in and for Clark County on June 7, 1950 to recover damages for injuries done by defendants to their crop of 27 acres of gladioli bulbs and flowers grown on leased lands in Multnomah County, Oregon in 1947 (R 3). Plaintiffs contend that the injuries and damages to their property were caused by defendants' willful and wrongful acts in depositing noxious gases, fumes and particulates upon the property

occupied by plaintiffs and upon the crops grown thereon.

On June 23, 1950 defendant Aluminum Company of America attempted to remove this action into the United States District Court for the Western District of Washington, Southern Division. Defendant Aluminum Company of America in its Petition for Removal, and affidavits in support thereof, admitted that C. S. Thayer was a resident of Washington (R 10) and that he was Works Manager of its plant when the cause of action arose (R 14) but alleged that he was improperly and fraudulently joined (R 10) for the purpose of avoiding and defeating the jurisdiction of the Courts of the United States.

On July 5, 1950 plaintiffs filed their motion to remand and the affidavit of James C. Dezendorf (R 23, 24). Said motion and affidavit traversed the allegations made by defendant Aluminum Company of America that defendant Thayer was fraudulently and improperly joined. On July 17, 1950 plaintiffs filed the affidavit of R. M. Perrin which asserted that plaintiff Mary Perrin was a resident and citizen of Washington (R 26, 27).

An issue of fact was thus presented to the Court in regard to the joinder of defendant C. S. Thayer. Based upon the affidavits filed by both parties, and without

any testimony, the Court proceeded to determine this vital factual issue.

We are not enlightened as to the Court's findings in that regard since the record is barren of any finding of fact upon that issue. The basis and reasons for the Court's decision can be found nowhere in the record. Without indicating its finding, the Court entered its order denying plaintiffs' motion to remand on September 18, 1950 (R 27).

Both defendants next appeared in the District Court on October 20, 1950 and moved the Court for an order dismissing plaintiffs' action on the ground that the action was barred by the statute of limitations (R 28). On December 8, 1950 the District Court entered its judgment order dismissing this action (R 29).

On Saturday, January 6, 1951 at 12:10 P.M. plaintiffs deposited in the main post office at Portland, Oregon their notice of appeal and bond, with postage prepaid, addressed to the Clerk of the United States District Court for the Western District of Washington, Southern Division, at Tacoma, Washington (R 44). On the same date copies of plaintiffs' letter of transmittal of said notice of appeal were mailed, postage prepaid, to defendants' attorneys Hart, Spencer, McCulloch, Rockwood & Davies, 1410 Yeon Building, Portland, Oregon and Metzger, Blair, Gardner & Boldt, Tacoma Building,

Tacoma, Washington (R 44). On December 6, 1950 the bond on said appeal was served upon defendants' attorneys (R 44).

The time for filing an appeal from the judgment of December 8, 1950 expired on Monday, January 8, 1951. In the normal course of the mails plaintiffs' notice of appeal should have left Portland on Train 459 at 5:00 P.M., January 6, 1951 (R 45). The mail from that train normally arrives in Tacoma at 8:00 P.M. and is immediately distributed (R 46). The District Court is located in the Post Office Building and receives its mail at a Post Office box (R 40, 41). Plaintiffs' notice of appeal should have been delivered to the District Court's box at 8:00 P.M. on January 6, 1951. Subsequently there were nine trains from Portland which arrived in Tacoma in time for mail to be delivered to the Clerk of the District Court at or before 2:30 P.M. January 8, 1951 (R 45).

The Deputy Clerk of the United States Court for the Western District of Washington, Southern Division, E. E. Redmayne, stated on February 1, 1951 that his office had not been in the practice of removing mail from its box in the afternoon and that if the letter containing plaintiffs' notice of appeal and bond on appeal had been delivered Monday afternoon, January 8, 1951 it would not have been opened by his office until the

next day, Tuesday, January 9, 1951 (R 40, 41). Three trains arrived in Tacoma from Portland on January 8, 1951 from which mail would have been delivered to the Clerk of the District Court at 2:30 P.M. on that date (R 45).

Plaintiffs' notice of appeal bears the Clerk's filing stamp dated January 9, 1951 (R 31). However, the Clerk has admitted that if it had been delivered in the afternoon of January 8, it would probably not have been stamped until the following morning (R 41).

Defendants moved to dismiss plaintiffs' appeal on the ground that it was not timely filed. On April 9, 1951 defendant's motion was granted by this Court and on May 14, 1951 this Court issued its mandate based thereon. On May 17, 1951 that mandate was entered of record in the District Court (R 47). On June 8, 1951 the District Court entered its Judgment on Mandate affirming its judgment of December 8, 1951 (R 50).

On July 17, 1951 plaintiffs filed their motion (1) to vacate the order of the District Court denying plaintiffs' motion to remand, (2) to vacate the judgment of the District Court entered December 8, 1950, (3) to vacate the judgment of the District Court entered June 8, 1951 and (4) to remand this action to the Superior Court of the State of Washington in and for Clark County (R 52).

In urging that motion plaintiffs relied upon Rule 60 of the Federal Rules of Civil Procedure following Title 28 U.S.C.A. Sec. 2072. It was pointed out to the Court that at the hearing on the motion to remand a factual issue had been raised and that a determination of that issue was necessary to the Court's decision, but that no findings of fact had been made by the Court. It was further called to the Court's attention that based upon the affidavits on file herein, which constituted all the evidence on the matter, the Court could not conceivably have made any findings which would have supported its decision. Because of that irregularity in the proceeding and because of the inadvertent and excusable failure of plaintiffs' bona fide attempt to take an appeal, the District Court should have reviewed and vacated its previous decision.

Due to Judge Leavy's illness Judge McLaughlin heard argument on the matter and on August 3, 1951 he entered his order denying plaintiffs' motion (R 53). The record does not indicate the basis for the Court's decision but the statement was made by the Court that it did not feel that it had the authority to overrule the decision by a judge of coordinate jurisdiction.

On August 25, 1951 plaintiffs filed their notice of appeal and bond on appeal (R 55, 56).

Plaintiffs contend that the District Court erred in its failure to determine the facts in regard to the joinder of defendant C. S. Thayer and that if findings of fact had been made in regard to that issue it could not, and would not, have found any basis for the conclusion that plaintiffs had joined defendant Thayer without any intention to prosecute the matter to final judgment against him. What actually occurred was that the District Court made no finding at all upon this decisive issue. As announced from the Bench the District Court based its decision upon an entirely separate and distinct issue, wholly immaterial to the main issue,—that defendant Thayer was not liable to plaintiffs. Plaintiffs contend that this finding was not only wholly unrelated to the issue to be decided on the motion to remand but was one which the District Court had no authority to make at that stage of the proceeding.

Secondly, plaintiffs contend that the District Court erred in holding that plaintiffs' claim was barred by the Statute of Limitations in that it failed to apply Oregon law in regard to the nature of plaintiffs' right which they claim was violated by defendants. The tort having occurred in Oregon, under well-settled conflict of laws rules, the law of Oregon is determinative of the nature of the right. Under Oregon law the wrong committed against the growing crop of plaintiffs on their leased

land constituted "an action for the taking, detaining, or injuring personal property." The Washington three-year statute rather than the two-year statute of limitations applies to this type of action. Plaintiffs do not urge this point on appeal for any purpose other than to point out that plaintiffs' claims are not barred by the statute of limitations.

Third, plaintiffs contend that the District Court had authority under Rules 60 and 63 of the Federal Rules of Civil Procedure following Title 28 U.S.C.A. Sec. 2072, and under its inherent power, to correct the erroneous impressions of fact received by the Court during the remand proceedings.

Finally, plaintiffs contend that the laxity of the Clerk, the likelihood that the notice of appeal and bond on appeal actually were delivered prior to the expiration of the time for appeal, and the bona fide attempt by plaintiffs to take an appeal two days before the time for appeal expired made this a unique situation where the demands of justice required the District Court to exercise its inherent power to correct its own errors.

SPECIFICATION OF ERROR

The District Court erred in denying plaintiffs' motion (1) to vacate and set aside the order entered in this action on September 18, 1950, (2) to vacate and

set aside the judgment entered in this action on December 8, 1950, (3) to vacate and set aside the judgment entered in this action on June 8, 1951 and (4) to remand this case to the Superior Court of the State of Washington in and for Clark County.

SUMARY OF ARGUMENT

I

This action was not removable from the State Court.

A. The requisite diversity of citizenship required as a condition precedent to the jurisdiction of the District Court in a controversy of the character presented by the record in this cause does not exist.

B. No separate independent claim is stated against either defendant so that neither of them can remove all or any part of this action.

C. An action in which a resident defendant is a proper party may not be removed.

II

The District Court's failure to find the facts in regard to the joinder of defendant C. S. Thayer was an irregularity which justified vacation of the order denying remand.

A. Findings of Fact should have been made and entered by the District Court.

B. The erroneous ruling would not have occurred if the District Court had made and entered Findings of Fact.

C. The District Court had the power to vacate its order and judgment erroneously entered.

III

The District Court failed to apply Oregon Law, as it should have done under well-settled conflict of laws rules, on defendants' motion to dismiss on the ground that the action was barred by the statute of limitation.

IV

The refusal of the District Court to vacate its prior orders and judgments and to remand the action denied plaintiffs the remedy to which they were entitled and constituted an abuse of discretion.

ARGUMENT

I

This action was not removable from the State Court.

A. Diversity of citizenship is not present.

Plaintiff Mary Perrin is a resident and citizen of the State of Washington (R 26, 27). Defendant C. S. Thayer is also a resident and citizen of the State of Washington (R 10, 24). Thus the controversy is not one

wholly between citizens of different states and the action cannot be removed. 62 Stat. 930, 28 U.S.C.A. Sec. 1332 (1948).

B. Since no separate independent claim is stated against either defendant, neither of them can remove the case. The record indicates that there is no separate and independent cause of action which would justify removal under 62 Stat. 938, 28 U.S.C.A. Sec. 1441 (c) (1948).

C. Since C. S. Thayer is a resident defendant, the action may not be removed.

No Federal Question is involved and since C. S. Thayer is a resident defendant, properly joined and served with process prior to the filing of the petition to remove, the case cannot be removed. 62 Stat. 938, 28 U.S.C.A. 1441(b) (1948).

II

The District Court failed to find the facts in regard to the alleged fraudulent joinder of defendant Thayer. The failure to make findings of fact on an important issue was an irregularity justifying vacation of the order denying remand.

A. Findings of Fact should have been made and entered by the Court in regard to the issue of fraudulent joinder.

Rule 52, Federal Rules of Civil Procedure, requires that the Court enter Findings of Fact in regard to all actions tried upon the facts without a jury or with an advisory jury. The purpose of this Rule is to require findings on all factual issues.

In Ilsen and Hone, *Federal Appellate Practice as Affected By The New Rules of Civil Procedure*, 24 Minn. L. Rev. 1, 21 (1939) (quoted with approval in the Commentaries following Rule 52, Fed. R. Civ. P. following Title 28 U.S.C.A. Sec. 2072) the authors explain the rule as follows:

“It has been stated that under the Rules the distinction is between jury and non-jury actions instead of between law and equity; it would seem more accurate to say that the new distinction is between jury and non-jury issues rather than actions; for if the word ‘action’ in Rule 52 (a) is construed literally, the situation will then arise that there will be no findings of fact on some material issues in actions where as to particular issues a jury trial has been demanded. This result would be inconsistent with one of the purposes of Rule 52 (a) for in those cases what constituted the grounds of the trial court’s judgment would not be readily apparent to the appellate courts. * * * Hence Rule 52(a) should be construed to require findings on the court tried issues even though part of the issues in an action are tried to a jury. * * *”.

Rules 38 and 39 Fed. R. Civ. P. speak primarily of issues and expressly contemplate that in a single action some issues may be tried by a jury while others are tried by the court. In a case where some of the issues are tried by the court and others by the jury the clear intent of the Rules is that Findings of Fact will be made in regard to the court-tried issues. Any other result would be inconsistent with the purposes of the Rules.

In providing that findings of fact "are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)" the purpose was to except from the requirements of Rule 52(a) Fed. R. Civ. P. decisions made solely upon matters of law. There is no indication in the Rules that any factual issues determined by the court are to be excluded from the application of Rule 52(a), Fed. R. Civ. P.

Professor Moore at 5 *Moore's Federal Practice* (2d Ed.) P. 2652 has this to say about the purpose of Rule 52, Fed. R. Civ. P.:

"An examination of Rule 52(a) discloses that its objective is to have the trial judge set forth his findings of fact and conclusions of law in cases where he is the trier of the fact (including cases where he utilizes an advisory jury) where his decision turns in part upon a factual determination."

At 5 *Moore's Federal Practice* (2d Ed.) p. 2673, Professor Moore comments as follows in regard to the necessity of findings on all factual issues:

"The first five defenses enumerated in Rule 12(b), which may be made by motion, are: '(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process.' Insofar as a motion raising any or all of these defenses raises only a question of law, the district court need make no findings, even though the motion is sustained and the action is dismissed. But how stands the matter if the district court must determine the facts in ruling on such a motion? In *King v. Wall & Beaver Street Corp.* [145 F. 2d 377, 381 (App. DC 1944)] the defendant's objection to improper venue raised issues of fact, in addition to questions of law; a preliminary hearing was had pursuant to Rule 12(d); and the district court made findings. Judge Groner, for the Court of Appeals of the District of Columbia stated:

'Such preliminary hearings are not summary proceedings, but are separate trials of separate issues. * * * Consequently, the court was fully justified, indeed, was required, to make findings of fact.'

Although the literal language of the 1946 amendment stating that findings are unnecessary on decisions of motions under Rule 12 may obviate the above decision, made prior to the 1946 amendment, we do not believe that it should for two reasons. The 1946 amendment should be read in conjunction and harmonize with the earlier provision of the Rule requiring findings in all actions 'tried upon the facts'; and the reasons for findings of fact are equally pertinent to this proceeding."

In *Smith v. Southern Pacific Co.*, 187 F. 2d 397, 400, (9th Cir. 1951) cert. denied, 96 L. Ed. Adv. Op. No. 1, p. 31, this court commented upon the fact that the record failed "to reveal any finding of fact by the trial court on the questions of fraudulent joinder" and implied that such finding should be made when the question of fraudulent joinder is raised. The same implication is found in *Wells v. Missouri Pac. R. Co.*, 87 F. 2d 579, 581 (8th Cir. 1937).

Defendants admitted that defendant C. S. Thayer was Works Manager at the time the alleged wrongful acts were committed (R 14). However, they contended that plaintiffs had fraudulently joined him with knowledge that he had no control or supervision of defendant Aluminum Company of America's plant and that only the non-resident officers of the defendant corporation had authority in the control and supervision of the plant. Plaintiffs denied those allegations and asserted that defendant Thayer had supervision and control of the aluminum plant.

The factual question to be determined in the removal proceedings was not whether defendant Thayer was liable to plaintiffs, but whether plaintiffs thought he was liable and intended to secure a joint judgment against both defendants. No oral testimony was introduced and the entire record is before this Court. Based

upon the record, no evidence whatsoever is available to support a finding that plaintiffs did not intend to obtain a joint judgment against both defendants. Had this issue been passed upon by the Court, it is inconceivable that it would have found any basis for defendants' allegation that defendant Thayer had been fraudulently joined as a defendant.

The questions to be determined on removal were: (1) whether there was a real intention to get a joint judgment and (2) whether there was a colorable ground for it shown as the record stood when the case was removed. *Smith v. Southern Pacific Co.*, 187 F. 2d 397, 401 (9th Cir. 1951), cert. denied, 96 L. Ed. Adv. Op. No. 1, p. 31, *Chicago R. I. & Pac. R. Co. v. Schwyhart*, 227 U. S. 184, 194 (1913).

It is apparent from an examination of the complaint that a cause of action was stated against both defendants. It has never been contended by defendants that the complaint failed to state a cause of action against either defendant and that issue was not raised in the District Court.

Appellants concede that whether the complaint states a cause of action against defendant Thayer is to be determined by the law of Washington. However, the nature and extent of liability is governed by the law of Oregon where the tort occurred. *Young v. Masci*, 289

U. S. 253, 258 (1933); *Richardson v. Pacific Power & Light Co.*, 11 Wash. 2d 288, 299; 118 P. 2d 985, 991 (1941); *Mountain v. Price*, 20 Wash. 2d 129, 132, 146 P. 2d 327, 328 (1944).

In Oregon all persons engaged in the commission of a tort are wrongdoers and no one of them can excuse himself on the ground that he acted as the agent of another. *Riesland v. Schick*, 111 Or. 42, 46, 224 Pac. 827, 828 (1924); *Clarkson v. Wong et al*, 150 Or. 406, 412, 42 P. 2d 763, 765, 45 P. 2d 914 (1935). 20 A.L.R. 109. 99 A.L.R. 410. It is admitted that defendant Thayer was Works Manager of defendant Aluminum Company of America's plant at the time the cause of action arose (R 14), and it is a universal rule that the manager or supervising agent is personally liable for his torts committed under the direction or command of his principal, *Duncan et al v. Flagler*, 19 Okla. 18, 20, 132 P. 2d 939, 941 (1942); 2 *Am. Jur.* p. 257 Agency Sec. 326, and that an officer or agent of a corporation is personally liable for trespasses committed by him or under his direction. 3 *Fletcher, Cyclopedia of the Law of Private Corporations*, p. 775 Sec. 1163; 13 *Am. Jur.* p. 1049 Corporations Sec. 1123. It is, of course, immaterial that the injury was removed by time and space from the commission of the wrongful act. *Brown v. Jones*, 130 Or. 424, 432, 278 Pac. 981, 983 (1929); *Cartwright v. Southern*

Pacific Co., 206 Fed. 234, 235 (D. Ore. 1913); *Western Union Teleg. Co. v. Bush*, 191 Ark. 1085, 1090; 89 S. W. 2d 723; 725 (1935).

The only issue before the District Court on the removal proceedings was whether there was a real intention to secure a joint judgment. That matter was put squarely in issue by the allegations in defendants' removal petition and supporting affidavits and the denial thereof by plaintiffs.

It necessarily follows that the District Court should have determined the facts in regard to the issue of fraudulent joinder and should have entered Findings of Fact recording its findings.

B. The erroneous ruling would not have occurred if the District Court had made Findings of Fact.

The record does not indicate the finding of the Court in regard to the issue of fraudulent joinder and the fact is that no finding on that issue was announced by the Court. The only pronouncement from the Court was to the effect that it did not believe that defendant Thayer would be found liable. Obviously that is an entirely different issue from the one presented to the Court upon the motion to remand.

If the District Court had entered findings it would have been apparent that no determination had been

made of the issue involved in the removal proceedings. The matter would have been clarified by the necessity of putting into writing the issue and the Court's determination of it. An excellent statement of the purposes to be served by filing findings of fact is found in *United States v. Forness et al*, 125 F. 2d 928, 942 (2nd Cir. 1942), *cert. denied*, 316 U. S. 694 (1942) (cited with approval by Advisory Committee in its 1946 Note following Rule 52, Fed. R. Civ. R. following 28 U.S.C.A. Sec. 2072) where Judge Frank comments in this fashion:

"It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty. Often a strong impression that on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. When a federal trial judge sits without a jury, that responsibility is his. And it is not a light responsibility since, unless his findings are 'clearly erroneous', no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be."

The same view is expressed in 5 *Moore's Federal Practice* (2d Ed.) p. 2653 where the following is found:

"The purpose of findings of fact is three fold: as an aid in the trial judge's process of adjudication; for purposes of res judicata and estoppel by judgment; and as an aid to the appellate court on review."

C. The failure to make findings of fact in regard to the issue of fraudulent joinder was an irregularity which justified vacation of the order denying remand and the subsequent judgments entered in the District Court.

Rule 52, Fed. R. Civ. P. is mandatory and requires that the District Court enter findings in every proper instance. *United States v. Aluminum Company of America*, 2 F. R. D. 224, 231, (S.D.N. Y. 1941).

In 2 Barron & Holtzoff, *Federal Practice & Procedure*, p. 810, the following is found: "Rule 52 (a) requiring the trial court to find the facts specially and state separately its conclusions of law is mandatory and must be fairly observed."

In this case there was not only an irregularity in the failure to enter findings, but no findings were made upon the issue presented to the court. The court would have been justified in correcting the error thus resulting.

United States v. Geisler, 9 Fed. Rules Serv. 60b, 51, Case 2, p. 911. The District Court has authority under Rule 60b Fed. R. Civ. P. to vacate judgments whenever such action is appropriate to accomplish justice. *Klapprott v. United States*, 335 U. S. 601, 614 (1949).

Finally, the Court has inherent power to correct its own decisions. *Bucy v. Nevada Const. Co.*, 125 F. 2d 213, 216 (9th Cir. 1942); *McGinn v. United States*, 2 F. R. D. 562, 564, (D. Mass. 1942).

Before the adoption of the rules it was often said that the Court had unlimited power to correct its judgments during the term at which they were rendered. Freeman, *Law of Judgments* (5th Ed.) p. 376. With the abolition of the effect of terms by Rule 6, Fed. R. Civ. P. that power would seem to exist for at least one year after the judgment under the provisions of Rule 60.

When this matter was brought to the District Court's attention upon the motion to vacate it was obliged to correct the error into which it had been misled and should have determined for itself the facts in regard to fraudulent joinder. At that time it was pointed out that the Court had not previously passed upon this issue and had entered no findings. The District Court refused to consider the factual issue and denied the motion on the ground that it did not have authority to pass upon the ruling of another District Judge despite the express

provisions covering such a situation in Rule 63, Fed. R. Civ. P.

III

The action is not barred by the Statute of Limitations. The District Court should have applied Oregon law in regard to the nature of the wrong done to plaintiffs. *Young v. Masci*, 289 U. S. 253, 258 (1933); *Richardson v. Pacific Power & Light Co.*, 11 Wash. 2d. 288, 289; 118 P. 2d 985, 991 (1941); *Mountain v. Price*, 20 Wash. 2d 129, 132; 146 P. 2d 327, 328 (1944).

The injury to plaintiffs' property — damage by fumes, gas and particulates to growing crops on land leased and occupied by plaintiffs — occurred in Oregon and under Oregon law constituted an injury to personal property which is governed by the Washington three-year statute of limitations.

The Washington three-year statute includes "an action for taking, detaining, or injuring personal property." Rem. Rev. Stat. Sec. 159. It has been held in Oregon that an action for damage to growing crops on leased lands is "an action for taking, detaining or injuring personal property." *Brown v. Jones*, 130 Or. 424, 278 Pac. 981 (1929). In that case plaintiffs' growing crops on lands leased by him were injured by flooding waters which were discharged onto his property. No

valid distinction can be drawn between invasions by water and invasions by gases, fumes and particulates.

Since it is clearly established in Oregon that this type of action is one for "taking, detaining or injuring personal property" it necessarily follows that it should be governed by the Washington three-year statute and consequently the action is not barred by the statute of limitations.

IV

The refusal of the District Court to grant plaintiffs' motion to vacate its order denying remand and its subsequent judgments and to remand this case constituted an abuse of discretion.

Although the vacation of orders and judgments under Rule 60, Fed. R. Civ. P. is a matter within the sound discretion of the District Court, such discretion must not be exercised in an arbitrary or capricious manner. *Chicago & N. W. Ry. Co. v. Davenport*, 95 F. Supp. 469, 471 (S. D. Iowa 1951). When it was brought to the Court's attention, on the motion to vacate, that the factual issue in the removal proceeding had not been passed upon it was incumbent upon the Court to re-examine the matter. Plaintiffs requested a finding of fact and not a review of matters of law.

It was contended by defendants below that plaintiffs desired a review of the law after the time for appeal had expired. Such is not the case. Plaintiffs desire that the Court correct its erroneous impression of the facts. Such a correction is authorized by Rule 60(6) Fed. R. Civ. P. Formerly writs of *coram nobis* and *coram vobis* permitted such relief. Although the forms have been abolished, relief of that type is permitted under Rule 60b (6) Fed. R. Civ. P. In *Klapprott v. United States*, 335 U. S. 601, 614 (1949) Justice Black said:

“In simple English, the language of the ‘other reason’ clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.”

In this case the District Court might well have considered the fact that plaintiffs made a bona fide attempt to take an appeal from the judgment and order alleged to be erroneous. Two days before the time for appeal had expired plaintiffs mailed their notice of appeal to the District Court (R 44). In the normal course of the mails, the notice would have been delivered on Monday, January 8, 1952 (R 45).

The Clerk stated that he did not know whether the notice of appeal was received in the afternoon of that

day but he admitted that if it was delivered to the District Court's box on Monday afternoon it was not opened until Tuesday morning. In regard to the time the notice of appeal was delivered to the Clerk's office, the Clerk said: "In fact, there is hardly ever any mail in the afternoon and that is why we don't go down. But, if it did come in Monday afternoon, it was opened Tuesday" (R 41).

At 2:30 P.M. on Monday, January 8, 1951 three trains arrived from Portland and the mail was immediately distributed. The letter containing the notice of appeal may well have been and probably was contained in that delivery. Although it was not opened by the Clerk until the following morning, the notice would have been delivered by depositing it in the Clerk's box in time for it to be picked up during business hours. Delivery to the Clerk, not the mechanical act of stamping the papers, constitutes filing. *United States v. Adams*, 6 Wall. 101, 107 (73 U.S., 1868); *Baez v. People of Puerto Rico*, 82 F. 2d. 317, 321 (1st Cir. 1936); *J. D. Randall Co. v. Foglesong Machinery Co.*, 200 Fed. 741, 742 (6th Cir. 1912); *McCourt v. Singers-Bigger*, 150 Fed. 102, 104 (8th Cir. 1906).

These facts are pertinent not only to show that plaintiffs made an honest and sincere attempt to take an appeal which was defeated by the uncertainties of the

United States mails or the laxity of the Clerk's office, but also to show that plaintiffs have been diligent in asserting their rights and have continuously pressed for a proper decision upon their motion to remand.

The record, which is before this court in its entirety, shows that no finding of fraudulent joinder was, or could have been made. In the absence of fraudulent joinder there is no basis for the District Court's refusal to remand this case. Plaintiffs have diligently sought relief from the error created by the failure of the District Court to find the facts in this case and are entitled to a correct ruling upon their motion to remand. The case should, therefore, be remanded to the District Court with instructions to remand this cause to the state court from which it was improperly removed.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

R. M. PERRIN and MARY PERRIN,
Appellants,
v.

ALUMINUM COMPANY OF AMERICA and
C. S. THAYER,
Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the
Western District of Washington, Southern Division.

SMITH, BUCHANAN, INGERSOLL, RODEWALD & ECKERT,
WILLIAM H. ECKERT,
FRANK L. SEAMANS,

Union Trust Building,
Pittsburgh 19, Pennsylvania,

HART, SPENCER, MCCULLOCH, ROCKWOOD & DAVIES,
HUGH L. BIGGS,

WILLIAM W. WYSE,
1410 Yeon Building,
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METZGER, BLAIR, GARDNER & BOLDT,

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FILED

JAN 29 1952

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United States
COURT OF APPEALS
for the Ninth Circuit

R. M. PERRIN and MARY PERRIN,
Appellants,

v.

ALUMINUM COMPANY OF AMERICA and
C. S. THAYER,
Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the
Western District of Washington, Southern Division.

JURISDICTIONAL STATEMENT

The jurisdiction of the district court was based upon 28 U.S.C.A., Section 1441, which provides for the removal of actions in cases of diversity of citizenship where none of the parties in interest, properly joined,

is a citizen of the state in which the action is brought. There was complete diversity of citizenship between appellants and Aluminum Company of America (R. 9, 26). Appellees' petition for removal (R. 8), the affidavit of C. S. Thayer (R. 13) and the affidavit of Roy A. Hunt (R. 25) showed, and the court determined, that appellee C. S. Thayer, a resident of Washington, was fraudulently and improperly joined as a defendant and that the case was thus removable (R. 19, 27).

When supplemented by the foregoing statement, appellants' Jurisdictional Statement (Br. 1-2) adequately sets forth the basis for the jurisdiction of the district court and of this Court.

STATEMENT OF THE CASE'

This is the appellants' second appeal to this Court. The district court dismissed this action on December 8, 1950, because it appeared from the pleadings that the action was barred by the statute of limitations (R. 29). Appellants attempted to appeal from this judgment but their appeal was dismissed by this Court because appellants had not filed their notice of appeal within the time required by law (R. 48). The district court entered judgment pursuant to the mandate of this Court on June 8, 1951, affirming in all respects its judgment of December 8, 1950 (R. 48). Appellants approved the

'Appellants' brief contains a number of erroneous statements of fact and statements which are not supported by the record. These errors and unsupported statements are listed in the Appendix to this brief.

form of the judgment on mandate, did not object to its entry and did not appeal from it (R. 51).

On July 17, 1951, approximately six weeks after the entry of judgment on the mandate of this Court, appellants filed a motion: (1) to vacate the judgment on mandate; (2) to vacate the judgment entered on December 8, 1950; (3) to vacate the order of September 18, 1950, denying appellants' motion to remand; and (4) for an order remanding the case to the state court (R. 52). The motion did not state the grounds therefor as required by Rule 7(b)(1).² Appellants made no showing to justify the relief they sought; they relied only on the records and files in the case. On August 3, 1951, the Court, after oral argument, entered an order denying appellants' motion (R. 53). Appellants now appeal from that order.

There is nothing in the record to indicate on what, if any, basis appellants urged below that the judgments herein should be vacated. On this appeal they contend that the judgments should have been set aside in order that the Court might re-examine the question of fact upon which it had passed when it denied their motion to remand the case to the state court. But appellants have not shown, nor do they assert, that there has been any mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud such as might justify the vacation of a judgment under Rule 60(b)³ in order that an issue of fact may be re-examined.

²Federal Rules of Civil Procedure.

³*Ibid.*

Quite obviously appellants sought by their motion, and seek by this appeal, a review of the judgment dismissing this action on the very grounds asserted in their former appeal, *i.e.*, that the case should have been remanded to the state court and that the action was not barred by the statute of limitations (R. 32). They rely on Rule 60(b) to grant them a second chance to argue these questions in the district court and to appeal to this Court. The only circumstance suggested for this unusual and extraordinary relief is the dismissal of their untimely direct appeal from the original judgment (Br. 25). But Rule 60(b) clearly is not intended to afford a device by which an appeal may be had from a judgment other than as provided in the statutes and rules relating to appeals. The time for appeal from the lower court's judgment long since having expired, there is no present basis for a review by this Court of the issues therein adjudicated.

QUESTION PRESENTED

The precise issue before the Court is whether the trial court abused its discretion by refusing to vacate the judgment which it entered pursuant to the mandate of this Court and the judgment from which appellants' first appeal was taken. The determination of this issue depends upon whether the reasons advanced by appellants for the relief provided by Rule 60(b) are so compelling as to preclude any exercise of discretion by the lower court.

This issue is beclouded by arguments, contentions and suggestions contained in appellants' brief which clearly do not bear on the single issue to be decided by this Court. Preliminary consideration and elimination of these contentions, suggestions and arguments will clarify the real issue.

Refusal of the Court to Remand

Obviously, there can be no abuse of discretion where the Court refuses to do that which it is without power to do. Criticism of the Court's refusal to vacate its original order denying appellants' motion to remand the case to the state court and its refusal now to enter an order so remanding the case, as requested by appellants' motion,⁴ creates no real issue here. This is so because the Court lacked power to re-examine the fact issue which it had previously determined adversely to appellants, or to remand the case once final judgment had been entered.⁵ 28 U.S.C.A., Section 1447(c), provides:

"If at any time *before final judgment* it appears that the case was removed improvidently and with-

⁴After filing their original motion to remand, *appellants* moved the court for an order restraining and enjoining appellants, their agents and attorneys, from further prosecuting this action in the state court (R. 27-28). The court granted appellants' motion (R. 27-28). Appellants have never asked that this order of the court be vacated.

⁵The previous determination of the court with respect to the jurisdictional issue was clearly correct. Cases which required the court to determine the issue raised by Aluminum Company of America's charge of fraudulent joinder adversely to appellants are *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 27 Sup. Ct. 184; *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 42 Sup. Ct. 35.

out jurisdiction, the district court shall remand the case * * * .' (Italics supplied.)

Once appellants' former appeal was dismissed the trial court's determination that this action was properly removed became the law of the case. *Lehman Co. v. Appleton Toy & Furniture Co.* (7 Cir.), 148 F. (2d) 988. Thus the correctness of such finding or the denial by the court of appellants' motion to remand after final judgment may not be considered on this appeal. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 Sup. Ct. 317. *Cf. Roberts v. Cooper*, 61 U.S. 467, 15 L. Ed. 969;⁶ *United States v. Axman* (9 Cir.), 193 Fed. 644; *Bodkin v. Edwards* (9 Cir.), 265 Fed. 621; *Freeman v. Smith* (9 Cir.), 62 F. (2d) 291.

Statute of Limitations

Appellants include in their contentions and argue in their brief that the lower court erred in applying the Washington two-year statute of limitations to this action rather than the Washington three-year statute. This argument only confuses the real issue and is entitled to no consideration in this appeal. This was an issue upon which appellants intended to rely upon their former appeal (R. 32) but which has now become *res judicata*.

⁶In the *Roberts* case the Supreme Court said:

"It has been settled by the decisions of this court that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be heard or examined upon the second."

In spite of their contentions and arguments on the point, even appellants seem to concede that it is not in issue here (Br. 9).⁷

Dismissal of Former Appeal

Much of appellants' brief consists of a reargument of the matters presented to this Court on argument of appellees' motion to dismiss appellants' original appeal. Appellants neither expressly claim nor disavow the dismissal of their former appeal as a ground for their motion to vacate. Whether appellants' former appeal was timely cannot be an issue on this appeal since the matter has been decided by this Court and is now *res judicata*. Neither can appellants' failure through inadvertence or neglect to file their notice of appeal within the time required by law now be asserted as a ground for the relief requested. Such ground was not urged in the district court as a basis for the motion to vacate the original judgment and the judgment entered on mandate of this Court. As the affidavits filed in this Court in connection

⁷There can be no doubt but that appellants failed to commence their action in time. Washington cases holding that actions such as this are controlled by the two and not the three-year statute of limitations are *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 Pac. 298; *Sterrett v. Northport Mining & Smelting Co.*, 30 Wash. 164, 70 Pac. 266; *White v. King County*, 103 Wash. 327, 174 Pac. 3; *Island Lime Co. v. Seattle* 122 Wash. 632, 211 Pac. 285; *Pettigrew v. McCoy-Loggie Timber Co.*, 138 Wash. 619, 245 Pac. 22; *Welch v. Seattle & Montana R. Co.*, 56 Wash. 97, 105 Pac. 166; *Park v. Northport Smelting & Refining Co.*, 47 Wash. 597, 92 Pac. 442; *Weller v. Snoqualmie Falls Lumber Co.*, 155 Wash. 526, 285 Pac. 446; *Northern Grain & Warehouse Co. v. Holst*, 95 Wash. 312, 163 Pac. 775; *Constable v. Duke*, 144 Wash. 263, 257 Pac. 637; *Noble v. Martin*, 191 Wash. 39, 70 P. (2d) 1064.

with the former appeal demonstrate, appellees might have proved in the district court, if appellants had raised such an issue, that appellants' failure to file their notice of appeal within the required time was due to their own negligence and not to any "laxity" on the part of the clerk.

From the foregoing it is clear that the only issue before this Court is whether the district court abused its discretion in denying appellants' motion to vacate the judgments. Appellees' argument, therefore, is confined to that issue.

ARGUMENT

Rule 60(b) of the Federal Rules of Civil Procedure sets forth the grounds upon which a court may set aside a final judgment. It provides:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is

based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * *

It is established, and appellants concede (Br. 24), that a motion to vacate a judgment is addressed to the sound legal discretion of the trial court and that its determination will not be disturbed on appeal except for abuse of discretion. *Independence Lead Mines v. Kingsbury* (9 Cir.), 175 F. (2d) 983, cert. den. 338 U.S. 900, 70 Sup. Ct. 249.

Rule 60(b) reflects on its face that it was intended to afford relief only in unusual situations where the remedy by appeal is inadequate. Clearly it was not intended to permit or require the redetermination of an issue of fact already disposed of, without some proof of fraud or newly discovered evidence. Neither was it intended as an alternative to an appeal as a means of review. Otherwise specification of the situations in which relief may be granted under the Rule would be unnecessary and meaningless.

Appellants have made no attempt to show that a situation exists in which relief might be justified for any of the first five reasons enumerated in Rule 60(b). They attempt to stand upon the sixth ground: "any other

reason justifying relief from the operation of the judgment." But the Supreme Court has made clear that a court is not required or permitted to grant relief from a judgment on this ground except in the most "extraordinary circumstances." *Ackermann v. United States*, 340 U.S. 193, 71 Sup. Ct. 209. Appellants have not shown and the record does not disclose that there are any extraordinary circumstances here involved such as might justify the extraordinary relief which appellants seek. Certainly a possible error in the determination of a fact is not such a circumstance. See *Bronson v. Schulten*, 104 U.S. 410, where the Supreme Court said at page 416:

"It is quite clear upon the examination of many cases of the exercise of this writ of error *coram vobis* found in the reported cases in this country, and as defined in the case in this court above mentioned, and in England, that it does not reach to facts submitted to a jury or found by a referee, or by the court sitting to try the issues; and therefore it does not include the present case."⁸

When moving for vacation of the judgments, appellants did not state any grounds or specify any reasons whatever for the relief they sought. Rule 7(b)(1) of the Federal Rules of Civil Procedure provides:

⁸Throughout their brief appellants assume that there was a substantial issue before the court as to whether they had joined C. S. Thayer as a co-defendant with the fraudulent intent to defeat the jurisdiction of the United States court (Br. 3, 16, 19, 22). Actually in the affidavits which they filed appellants did not deny that the joinder was fraudulent, nor did they deny most of the facts which Aluminum Company of America showed in support of its allegation to that effect. When moving to vacate the judgments appellants did not offer any new evidence tending to prove that the joinder was made in good faith.

“An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought * * *” (Italics supplied.)

Appellants' failure to comply with the rule was sufficient ground in itself for denial of their motion. *Steingut v. National City Bank of New York* (E.D.N.Y.), 36 F. Supp. 486. Certainly this Court cannot reverse the order of the district court when there is nothing in the record to show on what, if any, ground appellants urged their motion below.

Appellants now assert that the failure of the court to make findings of fact when denying their motion to remand (prior to entry of the original judgment) required vacation of the judgments. But findings of fact are not required on decisions of motions. *Magidson v. Duggan* (8 Cir.), 180 F. (2d) 473, 479, cert. denied 339 U. S. 965, 70 Sup. Ct. 1000.

Rule 52 of the Federal Rules of Civil Procedure provides:

“ * * * Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).”⁹

⁹The Advisory Committee on Rules state in their Notes:

“The last sentence of rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under rule 12 or rule 56, except as provided in amended rule 41(b). As so holding, see *Thomas v. Peyser*, App. D. C. 1941, 118 F. 2d 369; *Schad v. Twentieth Century-Fox Corp.*, C.C.A. 3, 1943, 136 F. 2d 991; *Prudential Ins. Co. of America v. Goldstein*, N. Y. 1942, 43 F.

Rule 41(b) requires the court to make findings only in cases in which it renders judgment on the merits against the plaintiff. If a district court were required to make findings in connection with every motion on which it passed, whether it be a motion for discovery, a motion questioning the jurisdiction or venue of the court, a motion for leave to bring in additional parties, or a motion for any other of the many purposes for which motions may be made, the burden on the court would be intolerable. The language of Rule 52 is explicit and conforms with the expressed intention of the Committee on the Rules.¹⁰ Thus it is completely clear that the court was not required to make findings of fact when denying appellants' motion to remand, and appellants must then, at least, have so supposed.

At no time did appellants request the court to make findings of fact when disposing of their motion to remand. Instead, appellants asked the court to restrain them from proceeding any further in the state court (R. 27). When attempting to appeal from the original judgment dismissing this action, appellants did not assert that they intended to rely upon any supposed error of the court in failing to make findings of fact (R. 32). Appellants did not state in their motion to vacate that the court had erred by failing to make findings of fact (R.

Supp. 767; *Somers Coal Co. v. United States*, Ohio 1942, 2 F. R. D. 532, 6 Fed. Rules Serv. 52a.1, Case 1; *Pen-Ken Oil & Gas Corp. v. Warfield Natural Gas Co.*, Ky. 1942, 2 F. R. D. 355, 5 Fed. Rules Serv. 52a.1, Case 3; also Commentary, *Necessity of Findings of Fact*, 1941, 4 Fed. Rules Serv. 936."

Note following Rule 52 in Title 28, U.S.C.A.

¹⁰*Ibid.*

52). So far as the record discloses, the contention that findings of fact should have been made is asserted for the first time on this second appeal.

A party is not entitled to assert on appeal an objection which he did not make below. Rule 46 of the Federal Rules of Civil Procedure provides:

“Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.”

Since the appellants at no time made “known to the court the action which (they) desired the court to take,” they would not be entitled to object to the failure of the court to make findings on this appeal even if findings were required.

In *Fowler v. Crown-Zellerbach Corp.*, 163 F. (2d) 773, appellants attacked in this Court the portion of a pretrial order which limited the issues. The record did not disclose whether in the district court appellants had objected to the order or had requested that it be amended or modified. This Court held that Rule 46 precluded appellants from objecting to the order on appeal.

In *Bucy v. Nevada Construction Co.*, 125 F. (2d) 213, the district court had remanded the case to the state court after it had been removed. Four days later, how-

ever, the court vacated its order and proceeded to final judgment without any objection or protest from plaintiff. On appeal to this Court plaintiff asserted for the first time that the district court did not have power to vacate its order of remand and proceed to trial. This Court held that Rule 46 precluded plaintiff from raising this objection for the first time on appeal.

Appellants no doubt refrained from asking Judge Leavy to make findings of fact, assuming what must be obvious: Such findings simply would have made explicit what was implicit in the order denying the remand, i.e., that C. S. Thayer was improperly joined as a defendant. There was no substantial evidence to the contrary. Whether C. S. Thayer had been properly joined being the only issue, Judge Leavy's order denying the remand was tantamount to a finding that Thayer was not properly joined. *Rokey v. Day & Zimmermann, Inc.*, (8 Cir.) 157 F. (2d) 734, 738.

Rule 61 of the Federal Rules of Civil Procedure provides that nothing "omitted by the court * * * is ground * * * for vacating * * * a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Had the failure of the court to make findings of fact been asserted as a ground for appellants' motion to vacate the judgments, Rule 61 would have required the court to disregard such failure even if it thought findings were necessary. *Cornucopia*

Gold Mines v. Locken (9 Cir.), 150 F. (2d) 75, 78, cert. den. 326 U.S. 763, 66 Sup. Ct. 144. It was clear that Judge Leavy's ruling would have been the same even if he had made findings and that no substantial right of appellants was affected by his failure to do so.

From the foregoing it follows that the court was not privileged to vacate the judgments because no findings of fact were made when appellants' motion to remand was denied.

Appellants apparently have abandoned their position that the judgments should be vacated because of an error of law in denying their motion to remand (Br. 25). Clearly the remedy for the correction of an error of law, had there been such an error, would have been by appeal and not by application for vacation of judgment. *Lehman Co. of America v. Appleton Toy & Furniture Co.* (7 Cir.), 148 F. (2d) 988.

This case is similar in many respects to *Jackson v. Irving Trust Company*, 311 U. S. 494, 61 Sup. Ct. 326. Plaintiffs obtained a decree ordering the Alien Property Custodian to pay over to them a sum from the assets of a German corporation. Defendants did not appeal, but after the time for appeal had expired sought to have the decree set aside on the ground that the Court had been without jurisdiction to enter the decree. Defendants contended that the issue of jurisdiction had not been litigated. The Supreme Court, in a unanimous decision, held that it was error to vacate the decree. The Court said:

“And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree. (Citing cases). If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken.” (p. 330)

Certainly if a judgment or decree may not be vacated to permit the determination of an issue of fact which was not litigated, a judgment may not be set aside to make possible the redetermination of an issue which has already been fully considered by the court. Appellees submit that the court did not abuse its discretion in denying appellants' motion and that the order of the court must be affirmed.

Respectfully submitted,

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APPENDIX A

Erroneous Statements of Fact and Statements Not Supported by the Record Contained in Appellants' Brief

1. On page 5 appellants inadvertently state that "On December 6, 1950, the bond on said appeal was served upon defendants' attorneys."

The fact, as disclosed by counsel's affidavit, is that appellants' Portland counsel mailed a certified copy of the bond on appeal to appellees' Tacoma counsel on January 6, 1951 (R. 44).

2. On page 5 appellants say that E. E. Redmayne stated that the clerk's office had not been in the practice of removing mail from its box in the afternoon, and that if plaintiffs' notice of appeal had been delivered during the afternoon it would not have been opened by the clerk's office until the next day.

There is no competent evidence in the record to this effect. Miss Redmayne's affidavit, as well as the affidavits of Edgar Schofield and Inez V. Stedman, filed in this Court, show that generally, although not invariably, the clerk's postoffice is attended by someone of the clerk's personnel in the afternoon and that probably, if the letter enclosing the notice of appeal had been placed in the clerk's box during the afternoon, it would have been picked up and filed on the same day.

3. On page 6 appellants state that "the Clerk has admitted that if it (the notice of appeal) had been de-

livered in the afternoon of January 8, it would probably not have been stamped until the following morning." The clerk actually stated that "there is a possibility that the mail wasn't picked up in the afternoon" (R. 41). See also Brief, pages 25-26.

4. On page 25 appellants state that in the normal course of the mail their notice of appeal would have been delivered on Monday, January 8, 1951. The fact, as disclosed by the affidavit filed by appellants, is that in the normal course of the mail the notice of appeal would have been delivered on Sunday, January 7, 1951, and that if it had been so delivered, it would have been filed on January 8 (R. 43). That the notice of appeal was not delivered on January 7 demonstrates that it was not carried in the normal course of the mail. It is now impossible to tell whether the envelope containing the notice of appeal was misaddressed, mislaid, mis-sorted, or misdelivered.

5. On pages 8 and 19 appellants state that when denying their motion to remand, the district court announced from the bench that it based its decision on the issue "that defendant Thayer was not liable to plaintiff." This statement is not supported by the record.

6. On pages 7, 22 and 24, appellants state that they pointed out to the district court in urging their motion for vacation of judgment that no findings of fact had been made by the court in determining the factual issue raised by their motion to remand, that findings of fact were necessary, and that it was therefore incumbent upon the court to determine the facts. These statements

are not supported by the record. So far as the record shows the first time that appellants have urged anywhere that the district court erred by failing to file findings of fact is on this appeal.

7. On pages 7 and 22, appellants say that Judge McLaughlin stated on denying their motion for vacation of judgment that he did not have authority to overrule the decision by a judge of co-ordinate jurisdiction. This statement is not supported by the record.

8. On page 9 appellants assume that the court received "erroneous impressions of fact" during the remand proceedings. Appellants have not shown, and there is nothing in the record to indicate, that the court received any erroneous impression of fact.

No. 13115

In The
United States Court of Appeals
For the Ninth Circuit

R. M. PERRIN and MARY PERRIN, *Appellants,*

vs.

ALUMINUM COMPANY OF AMERICA and

C. S. THAYER,

Appellees.

Appellants' Reply Brief

Appeal from the United States District Court for the
Western District of Washington, Southern Division.

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FILED

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In the
United States Court of Appeals
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vs.

ALUMINUM COMPANY OF AMERICA and

C. S. THAYER,

Appellees.

Appeal from the United States District Court for the
Western District of Washington, Southern Division.

Appellants' Reply Brief

Appellee's Brief contains only two points which were not raised and discussed in Appellants' Brief.

First, appellees claim that failure to comply with Rule 7(b)(1) Fed. R. Civ. P. was sufficient ground for denial of appellants' motion. It is sufficient to state the grounds in the Notice of Motion (Rule 52(b)(1) Fed. R. Civ. P.) and it would seem that the grounds of the motion might be stated in a memorandum accompanying the motion. The obvious purpose of Rule 7(b)

(1) is to require the moving party to give his adversary fair notice. 2 *Moore's Federal Practice* (2d Ed.) p. 1513. If that purpose is accomplished it would seem that there was a fair compliance with the Rule.

The Record indicates that appellants accompanied their motion by a Memorandum in Support of Motion (R 65) and that appellees filed a Memorandum in Opposition to the Motion to Vacate (R 65). While the Record on this appeal does not indicate the contents of that memorandum, it is a fair assumption that it did state the grounds upon which appellants based their claim to relief.

It is also reasonable to assume that appellees understood the grounds upon which appellants claimed to be entitled to the requested relief since no objection was made to the form of the motion and this point is raised for the first time on this appeal. It is also worth noting that in *Steingut v. National City Bank of New York*, 36 F. Supp. 486 (E.D. N.Y. 1941) (the only authority cited by appellees on this point), the opposing party objected to the form of the motion because it failed to state the grounds upon which it was made. In spite of the objection, no attempt was made to comply with the Rule. The opinion indicates that the decision is not one which would generally be made but was lim-

ited to the unusual situation in that case. At page 487 of the opinion Judge Mascowitz said,

“The court would ordinarily excuse the failure to comply with this rule if it were inadvertent, but such is not the case here.”

That is certainly a far different situation than is present in the instant case. If the form of the motion was defective (which is doubtful considering that it was accompanied by a Memorandum in support of the motion) there is nothing to indicate that the error was more than inadvertence. Although it may be better practice to state the grounds in the motion, it appears that there was a sufficient compliance with the Rule in this case and, in any event, appellee did not object to the form of the motion and should not now be allowed to claim that it was defective.

The second point raised by appellees is that appellants did not make known to the court the action which they desired the court to take and cannot now raise the issue. (Appellees' Brief p. 13.) Apparently the issue to which appellees refer is the failure of the District Court to make findings of fact on appellants' motion to remand.

Appellees rely upon Rule 46 Fed. R. Civ. P. as authority for the proposition that a party is not entitled to assert on appeal an objection which it did not make below. Two cases are cited by appellees on page 13 of their brief in support of their theory but neither of them deal with objections to the failure to make findings of fact and no such case can be found because Rule 52 provides that "Requests for findings are not necessary for purposes of review." It is the duty of the trial court to make findings and failure by a litigant to request them cannot prejudice him. 5 *Moore's Federal Procedure* (2d Ed.) p. 2675. In *Monaghan v. Hill*, 140 F. 2d 31, 33 (9th Cir. 1944) this court held that Rule 46 Fed. R. Civ. P. does not apply to the acts required by Rule 52 Fed. R. Civ. P. In accord is *Cafritz v. Koslow*, 167 F. 2d 749 (App. D.C. 1948).

Appellants disagree with most of the statements and propositions advanced by appellees in their brief and feel that the authorities cited by them do not support those propositions, but it is not proposed to debate each of them in this brief. However, appellants call the attention of the court to a few of the statements and propositions which are not supported by fact or authority.

On page 2 of their brief appellees say that "the court determined that appellee C. S. Thayer, a resident of Washington, was fraudulently and improperly joined as a defendant." The record does not indicate that such a determination was made by the Court.

On page 5 and page 9 appellees say that the court had previously determined the factual issue involved in the removal proceeding. The record does not indicate the court's determination of this factual issue.

The cases cited on page 6 deal with collateral attack and relitigation of issues decided on a former appeal. There is no question of collateral attack in this proceeding and the only issue on the former appeal was whether the appeal was timely filed. An adverse decision on that point does not prevent appellant from seeking relief on proper grounds under Rule 60, Fed. R. Civ. P.

In footnote 7 on page 7 of their brief appellees argue that the Washington two-year statute of limitations applies. However, they refuse to recognize that the tort is alleged to have occurred in Oregon and that the action, under Oregon law, is of the type covered by the Washington three-year statute of limitations. Appellees cite here, as they did in the District Court, only cases involving torts which occurred in Washington and

which have no application to the issue presented in this case.

In the second and third point in their Appendix appellees rely upon the affidavits prepared by counsel for appellees and signed by personnel in the clerk's office. However, the statements contained in appellants' brief, and criticized by appellees, are fully supported by the transcript of the proceedings in the District Court on February 1, 1951. Referring to the notice of appeal the clerk said, "if it did come in Monday afternoon, it was opened Tuesday" (R 41).

The Record refutes the statement made in paragraph 8 of Appellees' Appendix and indicates that the court did receive erroneous impressions of fact.

In *Cornucopia Gold Mines v. Lochen*, 150 F. 2d 75 (9th Cir. 1945), cert. denied 276 U.S. 763, cited by appellees on page 15 of their brief, the court said that the result would have been the same and liability would have been imposed even if the trial court had found plaintiff to be a trespasser as was requested. There is no similarity between that case and the one before this court where the finding which appellants seek would require the case to be remanded to the state court. Nor is there any foundation for the proposition stated on page 15 that Judge Leavy's ruling would have

been the same even if he had made findings. The record itself is the best refutation of that assertion. The petition for removal (R 11) and the affidavit of C. S. Thayer (R 16) allege on information and belief that appellants knew that defendant C. S. Thayer was not liable. (Actually the allegations are that neither defendant was liable.) Based on the evidence presented the District Court could have prepared no finding of fraudulent joinder. An attempt to state such a finding would have disclosed to the court that it had been misled.

CONCLUSION

Appellants contend that the record does not contain any evidence of fraudulent joinder. The District Court made no finding of fact on that issue although required to do so by Rule 52. Without a finding of fraudulent joinder there is no basis for the District Court's jurisdiction. No such finding could be made and the District Court's error would not have occurred if it had followed the mandatory requirement of Rule 52 Fed. R. Civ. P. by making findings of fact. Since the order denying Remand was improperly made as a result of the court's failure to determine the facts in the prescribed manner, the District Court should have vacated that order upon appellants' motion. Refusal to vacate the order denied

substantial rights to appellants and constituted an abuse of discretion.

Appellants respectfully submit that this court should remand this case to the District Court with instructions to remand it to the state court from which it was improperly removed.

Respectfully submitted,

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